

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION
CASE NO. 3:18-CV-3118-JFA

BRIAN BOWEN II,

JUNE 26, 2019
10:37 A.M.

Plaintiff,

vs.

ADIDAS AMERICA, INC.;
JAMES GATTO; MERL CODE;
CHRISTIAN DAWKINS; MUNISH
SOOD; THOMAS GASSNOLA; and
CHRISTOPHER RIVERS,

Defendants.

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TRANSCRIPT OF HEARING ON MOTIONS
BEFORE THE HONORABLE JOSEPH F. ANDERSON, JR.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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(Appearances continue on next page)

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(Appearances continue on next page)

APPEARANCES (cont'd):

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REPORTED BY: Ms. Carly L. Horenkamp, RDR, CRR, CRC
Official Court Reporter
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901 Richland Street
Columbia, SC 29201
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10:37 1 (Open Court, 10:37 a.m.)

2 THE COURT: Good morning. Please be seated.

3 All right. We're here this morning in the case of Bowen versus
4 Adidas and others. We have, I believe, a total of five motions
5 to dismiss under 12(b)(6) and one motion to dismiss for lack of
6 personal jurisdiction. We sent out a memo yesterday setting
7 some time deadlines. And let me just say, a lot of judges do
8 not hold oral argument in motions to dismiss and summary
9 judgment motions, having determined over the years that the
10 argument really does not help very much in consideration of the
11 briefs.

12 I, on the other hand, like oral argument because it
13 helps me get a better feel for the case, and if I have some
14 concerns I can ask questions. And I realized last night, by
15 having argument I might be suggesting to the lawyers that I
16 have not read the briefs. I promise you, I have read the
17 briefs and I'm not here today to get a *Reader's Digest* version
18 of the briefs. I've read them. My law clerk has ready them.
19 We've looked at some of the relevant cases. I understand the
20 issues. And so that's why we put some time limits, because we
21 just cannot wear out the whole day today with argument.

22 So with that, I would suggest that we take up the
23 Adidas motion first and then the parallel motions by the other
24 four defendants after that, and then deal with the personal
25 jurisdiction issue last, if that's okay.

10:39 1 MR. MCLEOD: Whatever the Court's preference, Your
2 Honor.

3 THE COURT: All right. Well, who is going to speak
4 for Adidas?

5 MS. DINKINS: Your Honor, I'm Lucy Dinkins with Wyche
6 here for Adidas. I'm here with Jim Cox also from Wyche, as
7 well as Will Taft here at the table, Miheer Mhatre and Nathan
8 Richards, all from Debevoise and Plimpton in New York.

9 THE COURT: All right.

10 MS. DINKINS: They have all been admitted pro hoc
11 vice, and if it's okay with the Court, we'd like for Mr. Taft
12 to present the argument.

13 THE COURT: All right. Mr. -- say again? Last name
14 again?

15 MR. TAFT: Will Taft.

16 THE COURT: Task, okay.

17 MR. TAFT: Good morning, Your Honor.

18 THE COURT: All right. Good morning, Mr. Task. Be
19 glad to hear from you.

20 COURTROOM DEPUTY: Taft.

21 THE COURT: Taft. All right, Mr. Taft. I'm sorry, I
22 knew that.

23 MR. TAFT: Good morning. We've discussed among
24 ourselves how to present the arguments most efficiently this
25 morning. With Your Honor's permission, I will address the

10:39 1 arguments that support dismissal of all counts against all
2 defendants.

3 THE COURT: All right.

4 MR. TAFT: Those are three in number: The failure to
5 allege a RICO injury; the failure to allege proximate cause;
6 and then the *in pari delicto* unclean hands defense.

7 THE COURT: All right.

8 MR. TAFT: After that I'll briefly address the
9 arguments that are unique to counts or just to Adidas, and
10 that's the 1962(c) argument on Count 1; the failure to
11 plausibly allege that Adidas agreed to participate in the
12 alleged conspiracy, that's Counts 2 and 4; and then the
13 vicarious liability argument, which argues that Adidas can't be
14 held liable for the acts of its employees as alleged in the
15 complaint.

16 THE COURT: All right.

17 MR. TAFT: In this RICO action, Mr. Bowen seeks
18 damages for alleged harm to his professional basketball career.
19 When the complaint was filed, Mr. Bowen was playing in the
20 Australian National Basketball League. As of last week, he
21 signed a contract with the Indiana Pacers of the National
22 Basketball Association.

23 THE COURT: He was not drafted, but he signed -- he
24 did sign with them on a farm team basically; is that right?

25 MR. TAFT: Your Honor, he signed what's called a

10:41 1 two-way contract, which is -- it's a uniform player contract
2 with the NBA team. There are limits to the number of days he
3 can spend with the NBA team. The rest of those days he'll be
4 spending on the -- what's called the G League or the second
5 tier league.

6 THE COURT: All right. Very good.

7 MR. TAFT: Mr. Bowen asserts in this case that his
8 career would have been on a different and more profitable
9 trajectory had he been able to play college basketball. He had
10 committed to attend the University of Louisville in the summer
11 of 2017, but Louisville refused to let him play after it
12 learned that the FBI was investigating payments made to his
13 father. Those payments, among others accepted by Mr. Bowen's
14 father, rendered Mr. Bowen ineligible under the NCAA rules and
15 Louisville declined to petition the NCAA for his reinstatement.
16 At that point Mr. Bowen left Louisville, despite the university
17 having assured him that they would allow him to keep his full
18 scholarship.

19 The FBI's investigation resulted in the prosecution of
20 three of the defendants, including one former Adidas employee,
21 Mr. Gatto, and a former Adidas consultant, Mr. Code.

22 THE COURT: And Adidas, the corporation, was not named
23 in the criminal case.

24 MR. TAFT: No, Your Honor. Adidas has not been
25 charged in connection with any of the actions covered by the

10:42 1 FBI investigation.

2 THE COURT: All right.

3 MR. TAFT: The SDNY convictions were based on the
4 theory -- and those are all on appeal, I should mention -- they
5 were all based on the theory that this payment scheme had
6 caused harm to the university by causing it to give an athletic
7 scholarship that it otherwise would not have.

8 The convictions do not establish that Mr. Bowen was
9 harmed. The convictions certainly do not establish the facts
10 necessary to plead a RICO claim. Counsel for Mr. Bowen
11 presents the convictions and guilty pleas as dispositive as to
12 this matter. They are not. With respect to the points raised
13 in Adidas's motion, they're not even relevant, as I will
14 explain.

15 So let me turn away from the trial in New York and
16 turn to this case. The RICO statute requires injury to civil
17 plaintiffs' business or property. That's in 18 U.S.C. 1964(c).
18 And that injury needs to be caused by the conduct constituting
19 the predicate criminal act. This is a standing requirement
20 and, to me, the complaint must allege realized harm to a
21 concrete interest.

22 There are a number of cases cited in the briefs. If I
23 may briefly call out three. Judge Flanagan of the Eastern
24 District of North Carolina stated in *Strates Shows v.*
25 *Amusements of America* that an expectancy interest, even if

10:43 1 highly certain, is not a recognizable property interest for
2 purposes of RICO. That's 379 F.Supp.2d 817.

3 The Fourth Circuit recently affirmed and adopted the
4 District Court of the Eastern District of North Carolina's
5 decision in *Taylor v. Bettis*. That's at 693 Fed. Appx. 190.
6 And that case held that injury to mere expectancy interests or
7 to an intangible property interest is not sufficient to confer
8 RICO standing.

9 And finally, I'd refer the Court to *In Re: American*
10 *Honda*, where Judge Motz of the District of Maryland drew a
11 clear distinction between lost past profits, which are
12 recoverable in RICO, in a RICO action, so the lost profits are
13 recoverable, but that an alleged lost opportunity to obtain
14 future profits are not, 941 F.Supp. 528.

15 With that standing requirement in mind, we consider
16 Mr. Bowen's claim seeking to recover treble damages for the
17 lost opportunity to enter the NBA draft as a first or second
18 round pick after only one or two years of college and the
19 associated impact on lifetime earnings. That's at paragraph
20 227 of the complaint. This harm is by its express terms an
21 expectancy interest. It is speculative, it is prospective, and
22 it is not sufficient to convey RICO standing.

23 Now that Mr. Bowen has signed with an NBA team two
24 years after matriculating to college, it's clear that he will
25 have a professional career. The question then is how will that

10:45 1 professional career be different had he been able to play
2 college ball? To state that question shows the speculative
3 nature of the inquiry. The benefits he hoped to derive by
4 playing college basketball and the college experience more
5 generally were expectancies, the loss of which is not
6 recoverable under RICO.

7 I submit that this is a standing issue. It's also an
8 issue that can't really be fixed by repleading the complaint.
9 It's simply not what the statute exists for.

10 There is other harm alleged in the complaint, but all
11 of it involves intangible interests and mere expectancies, with
12 the exception --

13 THE COURT: What about his inability to get training
14 and --

15 MR. TAFT: So, Your Honor --

16 THE COURT: -- menu and physical, you know, the weight
17 room and all that sort of thing?

18 MR. TAFT: So again, that is all part of his
19 expectation to get benefits of being part of the team.

20 THE COURT: Right.

21 MR. TAFT: His hope to get the training. None of that
22 is a contractual right.

23 THE COURT: And so you're saying the scholarship that
24 he signed only gave him free tuition and room and board.
25 Nothing else was promised.

10:46 1 MR. TAFT: Yes, Your Honor, and that's -- the
2 agreement itself is attached to plaintiff's opposition and you
3 can see that there's nothing in there about training, there's
4 nothing about being coached by a Hall of Fame coach, there's
5 even nothing about being on the team. All of that --

6 THE COURT: I can see how you could make a plausible
7 argument that a future professional contract could be
8 speculative or un- -- you know, not certain, but like when you
9 sign a scholarship with a major university, you anticipate
10 getting more than just room and board and books and tuition,
11 you plan to get the extra help athletically.

12 MR. TAFT: But Your Honor said it --

13 THE COURT: And I don't think that's speculative.

14 MR. TAFT: -- you anticipate.

15 THE COURT: I mean, that's not really speculative, is
16 it?

17 MR. TAFT: Excuse me?

18 THE COURT: The extra training, the extra weight room
19 and trainers and nutritionists and all that, that's not really
20 speculative, is it?

21 MR. TAFT: That is -- we argue that that is
22 prospective and it's an expectancy. It's not -- even if
23 something is highly certain to be realized, there's no question
24 that he intended to play, Louisville intended to have him play,
25 but again, there's not a concrete interest, there's not a

10:47 1 contract property right in the college athletics experience.
2 We've cited *Hawkins v. NCAA* out of the Central District of
3 Illinois, which involved the NCAA had taken a university and
4 said you can't play in the tournament, in the post season
5 tournament, and the player sued under RICO saying, hold on, we
6 were going to get media exposure, we were going to get
7 tournament experience, this was going to help our professional
8 careers. And the court said, you don't have a property
9 interest in that. They were on the team. They were going to
10 play. They don't have a property interest in the athletics
11 part of the scholarship. What they have is the right to room,
12 board, books, miscellaneous expenses. And again, this is --
13 if -- the complaint itself does not allege that the scholarship
14 was withdrawn.

15 THE COURT: Louisville said he could stay on
16 scholarship.

17 MR. TAFT: You're right, Your Honor.

18 THE COURT: You just can't play. We'll honor your
19 scholarship.

20 MR. TAFT: Yes, Your Honor, Louisville said that
21 explicitly. And in their opposition plaintiffs say, well, when
22 they sent out that tweet saying that he could continue to
23 receive the benefits of his scholarship, they effectively told
24 him to leave the university. That's -- you can't be
25 effectively telling him to leave when it literally says he can

10:49 1 stay and can get everything he's entitled to.

2 So, Your Honor, we do think that everything that he's
3 alleged is an expectancy interest, it's intangible, and with
4 the exception of the costs, the out-of-pocket costs of moving
5 to South Carolina and eventually moving to Australia, and
6 those, he's got a real causation problem that he's just not
7 going to be able to get over.

8 THE COURT: All right.

9 MR. TAFT: So turning to the causation then, again,
10 this is -- this is a standing requirement. He needs to show
11 proximate cause of his -- between the defendants' wrongful
12 conduct and his harm. There's a demanding showing -- I'd refer
13 the Court to the Fourth Circuit's decision of just last year in
14 *Slay's Restoration v. Wright*. That's at 884 F.3d 489. As
15 stated in that case, but for causation is not sufficient.
16 Intended harm is not necessarily sufficient. The fact that
17 harm is foreseeable is not sufficient to satisfy the direct
18 cause requirement. There must be a direct relationship between
19 the illegal conduct and the injury to plaintiff's business or
20 property. The direct -- quoting, "The direct result —
21 generally at 'a first step' in the chain of causation." That's
22 *Slay's* at 494. Mr. Bowen has not adequately pled this direct
23 cause as to any of his injuries.

24 So if we can start with the out-of-pocket costs. The
25 cost of applying to and trying out for other college teams and

10:50 1 the cost of relocating to Australia were costs incurred by
2 Mr. Bowen's own actions as a result of his decision to leave
3 the University of Louisville. He himself was the cause of
4 that. Before -- there's actually another step in that because,
5 again, the defendants were not the cause of him leaving
6 Louisville, it was Louisville's decision not to let him play on
7 the team and not to apply for his reinstatement with the NCAA.
8 So again, there are multiple intervening factors here between
9 the defendants' alleged wrongful conduct and the costs that he
10 incurred moving to South Carolina and Australia. Those costs,
11 for example, if he'd pursued opportunities closer to
12 Louisville, not then Australia at least, the amount of those
13 costs would have been either avoided or less. The fact that
14 the amount of those costs is entirely within plaintiff's
15 control shows that there's not a direct proximate causal
16 relationship between defendants' conduct and incurring those
17 costs.

18 With respect to the scholarship, as I said, he hasn't
19 actually properly pled that the scholarship was taken away. If
20 it was, that would have been a decision by Louisville, not a
21 decision by any of the defendants. There's not a proximate
22 cause.

23 And then there's eligibility, this idea that through
24 defendants' conduct he was prevented from receiving whatever
25 benefits, intangible though they may be, associated with

10:52 1 playing on the team and getting the athletics part of his
2 scholarship.

3 The complaint itself shows that there's not a direct
4 proximate cause. They talk at length about Dennis Smith, who
5 was a North Carolina State basketball player. The complaint
6 alleges his family received payments. The university didn't
7 know about it. He went on to become the ninth draft in the NBA
8 pick last year and has a professional career. In other words,
9 the exact same scheme, the exact same conduct that plaintiffs
10 allege is the predicate act was directed at Bowen and also
11 Dennis Smith. One of them was injured, the other wasn't. The
12 fact that the same conduct can be directed at somebody in the
13 same circumstances and not have injury shows that there are
14 intervening factors.

15 The Supreme Court in *Holmes* draws special attention to
16 the importance of looking at intervening factors between the
17 predicate act and the ultimate harm. Here, those factors are
18 the decision of Louisville not to allow him to play, the
19 decision of Louisville not to petition for his reinstatement,
20 and the NCAA's decision not to permit that reinstatement. All
21 of those are steps in the chain that show that whatever harm
22 he's suffered was not the direct result of the scheme. And
23 that's just with respect to eligibility. Once you start
24 thinking about his future career prospects, the number of
25 factors at play multiply exponentially. It's the quality of

10:54 1 his teammates. It's the needs of the teams that he might be
2 playing for. It's his development in Australia. This is so
3 speculative and it's so remote that there can't be a direct
4 causal connection.

5 THE COURT: All right. You don't want to use up all
6 your time on standing now. I think I understand that argument.

7 MR. TAFT: All right. So those are the standing
8 arguments. I'll briefly turn to *in pari delicto*. As described
9 in the complaint, and as he admitted in trial, Mr. Bowen's
10 father was a full and knowing participant in the alleged
11 scheme. He negotiated the amount of --

12 THE COURT: Well, that's undisputed, right? I mean,
13 nobody disputes that. Payment was made to his father, that's
14 been --

15 MR. TAFT: Payment was made to his father.

16 THE COURT: -- conclusively established, right?

17 MR. TAFT: And it's alleged in the complaint that his
18 father traveled to New York to receive the payment. That his
19 father -- if you look at the trial transcript, which is
20 referred to in the complaint, you'll see that his father knew
21 that by accepting this payment, it wasn't allowed by the NCAA
22 and his father didn't tell Louisville what was going on. So
23 his father is --

24 THE COURT: But Mr. Bowen, the son, pleads, and we
25 have -- at this stage we have to accept it as true that he did

10:55 1 not know about it.

2 MR. TAFT: Correct. And the opposition focuses on the
3 fact that he didn't know and his father was not his actual
4 agent. That's not our case. Our case is that his father was
5 acting with apparent authority on behalf of his son. That
6 because of his son's conduct, because of the plaintiff's
7 conduct, third parties reasonably expected that by making
8 payments to his father they were going to be able to ensure his
9 attendance at the University of Louisville. If you look at
10 paragraph 170 of the complaint, it spells out that ultimate
11 conclusion. Mr. Sood said that by making the payment to his
12 father, he believed that he had secured Mr. Bowen's attendance
13 at Louisville. That was the whole purpose of the alleged
14 scheme.

15 What we need to focus on is what conduct by Mr. Bowen,
16 the plaintiff, reasonably led the defendants to believe that
17 his father was acting on his behalf.

18 THE COURT: But aren't you asking me to draw
19 inferences in your favor at this point, which I'm not supposed
20 to do?

21 MR. TAFT: You're not supposed to do that, but I'm not
22 asking you to draw inferences. I think that all of this
23 appears directly on the face of the complaint. And in *Goodwin*,
24 the Fourth Circuit said even if you've got an affirmative
25 defense -- and we concede this is an affirmative defense -- if

10:56 1 the facts supporting that affirmative defense appear on the
2 face of the complaint, then it's proper to decide it on the
3 pleadings. And that's what we've got.

4 THE COURT: But as far as -- I mean, in a lot of
5 respects the law treats parents and children separat- -- I
6 mean, if a child's in a car driven by a parent and they have a
7 wreck, the child can sue the parent, right? I mean --

8 MR. TAFT: Yes, Your Honor.

9 THE COURT: -- the law recognizes that distinction.

10 MR. TAFT: It does, but again, the law also recognizes
11 that where -- by somebody's conduct, they cause third parties
12 to reasonably believe that someone is acting on their behalf,
13 that they are responsible and liable for the conduct of that
14 apparent agent. And again, we've got a situation where
15 Mr. Bowen pleads that he didn't put Louisville on his list.
16 The defendants notice that. That's all in the complaint at
17 153. He says, ah, the defendants notice that he wasn't on the
18 list. Therefore, a call was made to his father. Bowen goes to
19 visit Louisville.

20 A couple of weeks later, Dawkins, at paragraph 159, I
21 believe, says the deal is done. The next day Bowen signs a
22 commitment letter to -- or the scholarship papers with
23 Louisville. He then makes the public announcement. Again, by
24 his conduct it is clear that Mr. Bowen is doing exactly what
25 his father was telling -- allegedly telling the defendants

10:57 1 would be done, which is you pay me and Mr. -- and my son will
2 go to Louisville.

3 Because of this course of conduct, which in the trial
4 transcript you can see that this had been going on for years,
5 where his father would receive cash, Mr. Bowen would play for a
6 new team, his father would receive cash, Mr. Bowen changed high
7 schools because the new coach was paying him. This course of
8 conduct, this pattern over several years, establishes that it
9 was reasonable for defendants to believe that by paying his
10 father, his father was acting on his son's behalf. If that's
11 true, it's clear that he was part and parcel of the alleged
12 scheme and that he's an improper plaintiff for this RICO
13 action. Those are the arguments on all the counts for all of
14 the defendants.

15 THE COURT: All right.

16 MR. TAFT: Very briefly, if I have any time left.

17 THE COURT: For the court's reporter's benefit, we'll
18 give her the spelling of *in pari delicto* in a little bit after
19 the hearing.

20 COURT REPORTER: I got it.

21 THE COURT: You got it. Okay, good.

22 MR. TAFT: Unclean hands.

23 THE COURT: It drives the court reporters crazy when
24 we use Latin phrases.

25 MR. MCLEOD: And when I go, could I get the

10:59 1 pronunciation as well?

2 (Laughter.)

3 THE COURT: All right.

4 MR. TAFT: I will very briefly just touch on the
5 Adidas-specific arguments.

6 THE COURT: All right.

7 MR. TAFT: The count -- excuse me, Count 1 pleads a
8 1962(c) requirement and that requires that you've got a person
9 who is acting together with an enterprise, participating in an
10 enterprise. And the Supreme Court, in *Cedrick Kushner*
11 *Promotions*, that's the Don King case from 2001, was very clear
12 that you need to allege a distinct person, a person who is
13 distinct from the enterprise. Again, I think it's common
14 ground that an association, in fact enterprise, must be
15 comprised only of persons or entities sharing a common purpose.

16 The complaint alleges that the common purpose defining
17 the enterprise was to help Adidas, quote, grow and preserve
18 market share in the basketball shoe market. That is what they
19 say this entire enterprise was geared towards, was Adidas's
20 market share. That -- this count must be dismissed because
21 it's simply not plausibly alleged that the coaches, the other
22 defendants, the university coaches actually shared a common
23 interest in Adidas's market share. The only people who
24 plausibly shared that interest were Adidas itself, its
25 employees, and its agents. And if you've got the enterprise

11:00 1 limited to that group of people, then you can't have both a
2 person and the enterprise be the same person. So the count
3 needs to be dismissed.

4 In that regard, I do refer the Court to *Guaranteed*
5 *Rate v. Barr*, it's at 912 F.Supp.2d 671, and it's an
6 interesting case. It involves a complex mortgage fraud
7 involving developers, appraisers, bankers, straw purchasers,
8 really a cast of thousands, but the common purpose that was
9 alleged there was, there was a common purpose to help the
10 developers get out of personal guaranteed -- guarantees they'd
11 given on the construction loans. And they said, hold on, these
12 appraisers are running their own business. These straw
13 purchasers are in it for their own interests. You need -- the
14 fact is that the only people who were benefiting from the
15 alleged scheme was the company itself, and again, that simply
16 doesn't create the distinction between the person and the
17 enterprise required.

18 Lastly, I'll quickly address the conspiracy counts. I
19 think it is common ground that Bowen needs to allege an
20 agreement. Some plausible facts showing that Adidas agreed to
21 pursue the same criminal objective or adopted the individual
22 defendants' acts, and the complaint simply doesn't show that.
23 What it shows is that there were employees who were trying to
24 find ways to circumvent Adidas's controls on the issuance of
25 checks. They said we've got a problem. They said, you know,

11:02 1 it's going to take time. Adidas is asking for a lot of
2 information. There's no allegation that there's a formal
3 policy or indeed any action by any director or officer at
4 Adidas that sanctioned or tolerated or even knowingly
5 participated in any of this scheme. Instead, what you have is
6 a record that shows individual employees were trying to
7 circumvent those policies.

8 The testimony, it's cited in our brief, of a --
9 somebody in the finance department at Adidas, answered, you
10 know, I was unaware of the plan to pay the plaintiffs. This is
11 Ms. Harksen, who approved some of these invoices. I was
12 unaware of the plan. I knew it was wrong. Had I known, I
13 would not have approved it.

14 This is not evidence of a corporation that is engaged
15 in a RICO conspiracy, this is actually evidence of a
16 corporation that is -- has the proper controls in place and
17 employees who were attempting to circumvent those controls. On
18 these facts, there's simply no basis to hold Adidas directly or
19 vicariously liable for the alleged scheme.

20 With that, Your Honor, I'll stop.

21 THE COURT: All right. Thank you, Mr. Taft. Thank
22 you very much.

23 MR. TAFT: Thank you.

24 THE COURT: Who would like to go next on the defense
25 side? All right. Yes, sir.

11:03 1 MR. FINGER: Terry Finger on behalf of Merl Code.

2 THE COURT: Yes, sir.

3 MR. FINGER: May it please the Court. I think
4 Mr. Taft has covered almost all the arguments that Mr. Code
5 would join in. We did that with our motion and with our memo,
6 so just maybe two points, Judge.

7 As far as the speculative nature of eligibility or
8 playing college basketball, we had a great example of that
9 within the last two weeks. Toronto-Golden State are playing,
10 Durant comes back from being hurt and he goes down with a torn
11 Achilles. Same game, Thompson goes out with a torn ACL. The
12 first practice, the first informal scrimmage that Mr. Bowen may
13 have appeared at, he could have had either of those happen to
14 him. That just shows the speculative nature.

15 And then secondly, as to his eligibility, the facts
16 are clear that father Bowen was taking money for his son's
17 basketball services for many years prior to the facts in this
18 case. He had no eligibility if that had come out, so he didn't
19 lose anything from the facts in this case. Thank you, Judge.

20 THE COURT: Wait a minute now. You say the son had no
21 eligibility if this had come out?

22 MR. FINGER: If the fact that his father had been
23 taking money for his high school teams and the AAU teams he
24 played on long before any facts in this case, if those facts
25 had been determined by the NCAA, he would have had no

11:05 1 eligibility to go anywhere when he got out of high school
2 anyway.

3 THE COURT: Well, and I'm just -- I'm probably
4 remembering the facts wrong, but didn't it come out that Cam
5 Newton's father had taken some money?

6 MR. FINGER: It did, at Auburn, correct.

7 THE COURT: And he wasn't declared ineligible.

8 MR. FINGER: He was actually, they went to a
9 reinstatement procedure for Cam Newton and I think he sat out a
10 year and eventually was ultimately reinstated.

11 THE COURT: Oh, he did sit out a year and got
12 reinstated.

13 MR. FINGER: Yes.

14 THE COURT: Okay. I didn't remember that.

15 MR. FINGER: And Louisville in this situation said
16 we're not going to go through any eligibility reinstatement
17 motion with the NCAA. So those are my only two points, Judge.

18 THE COURT: Very good.

19 MR. FINGER: Thank you very much.

20 THE COURT: Thank you, sir.

21 All right. Ms. Barbier?

22 MS. BARBIER: Your Honor, may I proceed next?

23 THE COURT: Ms. Barbier, I'm going to give you extra
24 time on your separate motion too.

25 MS. BARBIER: Oh, okay, Your Honor.

11:06 1

THE COURT: We'll take that up at the end.

2

MS. BARBIER: I appreciate that. I don't think it's
going to be necessary.

4

(Off-the-record discussion between counsel.)

5

MR. TAFT: Sorry, Your Honor, it's a little bit far
from the pleadings perhaps, but Cam Newton did not sit out a
year. He was reinstated immediately.

8

MR. FINGER: My mistake, Your Honor.

9

THE COURT: Okay. All right.

10

MS. BARBIER: Your Honor, just briefly following up on
one of the last points that was made with Mr. Finger. It was
admitted by Mr. Bowen, Sr., on cross-examination during the
criminal trial that he had been accepting money on behalf of
his son as early as high school and specifically by a high
school coach at La Lumiere which rendered him ineligible long
before any payments were made to him allegedly by any Adidas
employee.

18

THE COURT: All right.

19

MS. BARBIER: And that is in the trial transcript,
Your Honor, and I don't know how much the Court intends to rely
on that or take judicial notice of it, but we can provide that
if the Court would like.

23

THE COURT: All right.

24

MS. BARBIER: Your Honor, I'm not going to repeat any
of the arguments made by Adidas, I understand the Court has

11:07 1 many lawyers to hear from today, and so I'm going to be
2 respectful of the Court's time and try to stay under the amount
3 of time you've given me --

4 THE COURT: All right.

5 MS. BARBIER: -- even in addition to the personal
6 jurisdiction motion.

7 So, Your Honor, what I want to talk about at first is
8 just the brief -- briefly, just the perspective that the Fourth
9 Circuit has on civil RICO cases. If it's not otherwise
10 evident, when you Google civil RICO claims and just do a simple
11 Google search, an article comes up that is entitled *Can A Civil*
12 *RICO Claim Ever Be Successful In The Fourth Circuit?* And that
13 article was written after a case in the District Court of
14 Maryland was issued in 2014 called *Yesko versus Fell*, and in
15 that case the district court, following the Fourth Circuit's
16 directives on civil RICO cases, found deficiencies with regard
17 to the pleading of predicate acts, with regard to the
18 enterprise, with regard to the failure of the plaintiff to meet
19 the Rule 9(b) requirements in civil RICO cases. No leave to
20 amend was granted in that case and the complaint was dismissed.

21 And so that is what I am asking this Court to do on
22 behalf of Mr. Gatto today. The district court in the *Yesko*
23 case reiterated the pronouncements of the Fourth Circuit that
24 not every dispute, not every fraud claim, not every business
25 dispute, not every case is a civil RICO case. The court was

11:08 1 very clear that the Fourth Circuit has made clear that it is a
2 unique cause of action. It does not cover all issuances of
3 wrongdoing and it is concerned with eradicating organized,
4 long-term, and habitual criminal activity. And they cited to
5 the *U.S. Airline Pilots Association versus AWAPPA* case. That's
6 a Fourth Circuit 2010 case. Basically both the Supreme Court
7 and the Fourth Circuit have characterized civil RICO cases and
8 civil RICO penalties as being very drastic, to be used in very
9 unique circumstances, and they have warned that it is an
10 extraordinary remedy used and should be reserved for conduct
11 whose scope and persistence pose a special threat to social
12 well-being. And I would submit, Your Honor, that is not even
13 close to what we have here.

14 What we have here is the plaintiff trying to parlay a
15 criminal prosecution in the Southern District of New York
16 against Mr. Gatto and the other defendants to contend that a
17 jury has already deliberated on these issues presented in this
18 case, and nothing, Your Honor, could be further from accurate.
19 It's a different case, it's different allegations.

20 As you know, a civil RICO case requires two predicate
21 acts, and the only predicate act that he alleges that is
22 consistent with the Southern District of New York case is the
23 wire fraud predicate act. The indictment against Mr. Gatto,
24 which is not attached to the complaint -- what is attached to
25 the complaint is the criminal complaint which was issued

11:10 1 initially prior to any grand jury returning indictments. The
2 indictment was superseded twice in that case and it did not
3 contain allegations of money laundering, it did not contain
4 RICO allegations, and it did not contain sports bribery
5 allegations.

6 I have a copy, Your Honor, of the actual second
7 superseding indictment that went to trial in the Southern
8 District of New York last year. I'm happy to hand one up if
9 the Court --

10 THE COURT: I actually have not looked at that. It
11 might already be in the record. But I'll take a copy of it. I
12 have not seen it.

13 MS. BARBIER: Okay. May I approach, Your Honor? But
14 Your Honor, a simple reading of that indictment shows that
15 there was a wire fraud conspiracy charged to all three
16 defendants, Mr. Gatto, Mr. Hawkins, and Mr. Code. There were
17 two substantive wire fraud counts, one involving the University
18 of Louisville, and that was all three defendants, the second
19 involving a substantive wire fraud count only as to Mr. Gatto
20 involved Kansas University. The government did not charge
21 money laundering, they didn't charge them with sports bribery
22 or RICO, and that is significant for a number of reasons, and I
23 want to talk about the most obvious reason why.

24 In May of 2017 we had a -- Attorney General Jeff
25 Sessions issued a memorandum to all 5,000 prosecutors in the

11:11 1 United States which was a sharp turn from where Eric Holder had
2 the Department of Justice, and the memo said that every federal
3 prosecutor is directed to charge the most serious crime
4 available carrying the toughest penalties.

5 The superseding indictment in this case was handed
6 down August 14th, 2018. So as Your Honor knows, every time a
7 superseding indictment is issued by a U.S. Attorney's Office, a
8 review process takes place and an analysis is done to determine
9 whether or not that -- whether or not Jeff Sessions' policy is
10 being complied with. In other words, they're reviewing all the
11 facts to determine what the most serious charge is with the
12 stiffest penalties that could be charged.

13 And as you know, the Southern District of New York is
14 the birthplace of RICO and the birthplace of money laundering
15 cases. The prosecutors all around this country love to throw
16 in a money laundering charge when they can do it because, as
17 Your Honor knows, it provides a two-level enhancement in the
18 sentencing guidelines, it has sometimes served as talking
19 points in negotiation sessions, and if you are going to trial,
20 it is impressive to a jury.

21 The government didn't do that here. They didn't do
22 that because it doesn't exist. And I want to focus first on
23 the money laundering predicate act that's alleged, because the
24 allegations that the plaintiff made in this case starting on
25 page 65 do not describe the crime of money laundering. Your

1 Honor has spent many years in this courtroom hearing cases,
2 criminal cases, on money laundering, and typically in a money
3 laundering case, as Your Honor knows, the government puts up an
4 IRS agent to tell the jury what money laundering is and to
5 describe how money laundering takes place. And the IRS agent
6 typically testifies that money laundering is the process by
7 which dirty money is cleaned and they tell the jury that it
8 is -- the dirty money is money that is illegally obtained,
9 money that is derived from criminal activity. And the money
10 laundering process is where the defendant tries to hide,
11 disguise, or conceal the nature of that money. They testify
12 about the three stages of money laundering: The placement
13 stage, the layering stage, and the integration stage.

14 And when you're looking to whether or not money
15 laundering is properly alleged here, Your Honor has to consider
16 the definition of money laundering, okay? And as Your Honor
17 knows, it can be done in a variety of different ways. It can
18 be done through the conducting of financial transactions, by
19 buying a car or a piece of property or a piece of art.

20 So if you turn to the allegations in the complaint in
21 this case and you look at the allegations of the complaint and
22 compare it to the definition of money laundering, it simply
23 doesn't fit, doesn't work. Even before -- in the money
24 laundering process, even before you get to the placement stage,
25 you have to have ill-gotten gains, you have to have money

11:15 1 that's derived from illegal activity.

2 The only allegation the plaintiff makes close to that
3 is in paragraph 183. The plaintiff alleges that "additional
4 proceeds from sales of apparel and footwear that it would not
5 have received had it not engaged in the criminal act of
6 racketeering described herein." The problem is the plaintiff
7 doesn't identify any additional proceeds from sales of apparel
8 or footwear that occurred. They don't -- in fact, to the
9 contrary, what they do is describe a number of instances in
10 this complaint where Adidas lost money.

11 On page 62 they allege that Adidas consistently came
12 up short in gaining market share.

13 On page 63 they allege that they lost half a billion
14 dollars.

15 And specifically on page 65 they describe how Adidas
16 lost huge sums of money when Derrick Rose tore his ACL.

17 On paragraph 131 they describe a scenario where Adidas
18 lost a large sum of money when an athlete allegedly paid Dennis
19 Smith and he signed a sneaker deal with Under Armour.

20 So they don't describe any ill-gotten gains. To the
21 contrary, they describe a number of instances where Adidas
22 loses money.

23 And then they go so far as to borrow a chart from the
24 government in the criminal case on page 28, and there's a
25 number of different arrows on that chart that point to where --

11:16 1 what is happening in this scheme alleged, and if you'll notice
2 on that chart, it doesn't have any arrows pointing back to
3 Adidas or showing that Adidas derived anything illegal from
4 this scheme.

5 So, Your Honor, I would say first and foremost the
6 fatal flaw in the money laundering argument is that there is no
7 ill-gotten gains. There is no proceeds of unlawful activity
8 that have been identified or that exist, that can't be fixed by
9 an amending of the complaint because that doesn't exist. And
10 we know in fact that with respect to the plaintiff in this case
11 there are no ill-gotten gains because nothing ever came to
12 fruition with Adidas's relationship to the plaintiff.

13 If you then look at the layering stage in the money
14 laundering process, the plaintiff attempts to describe these
15 contributions to the AAU as being a way to conceal ill-gotten
16 gains. Your Honor, in order for you to consider that
17 allegation as legitimate, you would have to find that Adidas is
18 conducting no lawful activities, which is, as everybody I
19 believe would agree in this courtroom, absurd. Every athletic
20 sportswear company that we could think of right now in America
21 supports youth sporting organizations. So the idea that this
22 was the -- the purpose of donating these monies is to hide
23 illegal money is absurd, Your Honor, and you do not have to
24 accept that.

25 And then finally, Your Honor, with respect to the

11:18 1 integration phase of money laundering, that doesn't work either
2 because there's no money allegedly going back to Adidas.
3 That's not even alleged in the complaint. So the very basic
4 components of money laundering are not alleged and are not
5 described in this complaint.

6 Your Honor, turning to the sports bribery predicate
7 act, that doesn't work either because the statute requires
8 that it has to be and it has to prohibit an attempt to fix the
9 outcome of a sports contest. There's no sports contest
10 identified in this complaint or that could be identified that
11 was affected by any of the alleged conduct of any of the
12 defendants here, so Mr. Bowen simply doesn't provide any
13 support for the assertion that Adidas's or Mr. Gatto's or
14 anybody's conduct in any way affected a coaching decision, a
15 game result of any kind.

16 THE COURT: My law clerk and I both agree that this
17 sports betting issue is the weakest component of the complaint,
18 so I don't think you need to spend any more time on that. I
19 want to hear from the plaintiff on that.

20 MS. BARBIER: Okay. Your Honor, I just want to say a
21 few words about the paragraphs 98 and 99 on the -- which
22 describes the government's investigation. Your Honor,
23 according to the complaint, it was a three-year investigation
24 that involved 89,000 pages of documents, subpoenas being
25 issued, and as Your Honor knows, the government's job in an

11:19 1 investigation is to identify ill-gotten gains. It's to
2 identify victims of a crime. There was ample opportunity for
3 Mr. Bowen to be identified as a victim. As you know, the
4 government has a very specific process for that with the VNS
5 system, it's the victim notification, where by law they have to
6 be notified of -- when they are the victim of a crime at every
7 stage in a criminal proceeding. You know, the government had
8 ample opportunity to espouse a theory by which Mr. Bowen would
9 be a victim. They never did that. And to the contrary, the
10 victims they identified, clearly identified, were the
11 universities. That was the theory they prosecuted this case
12 under.

13 So the idea that the collateral estoppel exists here,
14 that Mr. Bowen was identified as a victim, is just simply
15 inconsistent with the facts here. There was no victim impact
16 statement submitted or invited to him because he was not
17 considered a victim. As you know, the presentence report would
18 have a section on victims. It would order restitution. None
19 of that was done here. The government didn't --

20 THE COURT: Did the PSR identify the universities as
21 the victim?

22 MS. BARBIER: That's correct. And Your Honor, you
23 know, these issues, of course, according to the complaint were
24 thoroughly investigated and the government, as I've already
25 discussed, has its obligations to victims, as they do to charge

11:21 1 the more serious offenses.

2 Specifically, with respect to RICO, Your Honor, the
3 Department of Justice has -- the civil RICO policy manual of
4 the Department of Justice is 600 pages. That is how carefully
5 they look at and review a RICO allegation. The criminal policy
6 on it is even harder. A federal prosecutor does not have the
7 ability or the authority to simply take a RICO indictment to a
8 grand jury. It goes through very high levels of approval
9 within the Department of Justice. They, like the Fourth
10 Circuit, agree it should not be brought in every case. It is
11 reserved for very unique circumstances and they clearly chose
12 not to do so here.

13 Now, I don't stand by all the decisions the government
14 made in that investigation, Your Honor, but I will say that
15 with respect to those decisions, I believe they came to that
16 conclusion because the facts here simply don't fit RICO, money
17 laundering, sports bribery, or even wire fraud, for that
18 matter, but I'm not going to spend any time on that, Your
19 Honor.

20 I think, Your Honor, that my time is up. With respect
21 to the personal jurisdiction issue, Your Honor, I just want to
22 briefly say that it becomes a very simple issue if Your Honor
23 dismissed the RICO case. Obviously there's no -- nothing to
24 discuss. However, even if you leave in this RICO -- these RICO
25 charges, Mr. Gatto has absolutely zero connection to the state

11:23 1 of South Carolina.

2 THE COURT: I've never had this issue come up on
3 nationwide service of process in RICO cases, but I guess you
4 couldn't get much further apart than Oregon and South Carolina.

5 MS. BARBIER: That's correct, Your Honor. And I
6 think, you know, that --

7 THE COURT: But let me ask you this.

8 MS. BARBIER: Uh-huh.

9 THE COURT: In a modern age, I mean, is there a big
10 difference between a seven-hour plane flight from Oregon to
11 Columbia for \$750 versus a five-hour flight from Oklahoma
12 for \$500? I mean, is it really that much difference?

13 MS. BARBIER: Well, Your Honor, I think, you know,
14 that's all relative. Mr. Gatto is unemployed. Mr. Gatto has
15 just been -- undergone a three-year investigation which
16 resulted in his indictment and conviction and is now enduring
17 an appeal with the Second Circuit. I think that you have to
18 look at the individual circumstances and whether those
19 individual circumstances comport with due process and the Fifth
20 Amendment.

21 THE COURT: Let me ask you this. I'm not sure how
22 important it is, but I'm just curious, did he travel a lot with
23 his work with Adidas? Was he on the road a lot?

24 MS. BARBIER: Your Honor, I believe he's had to travel
25 over the years for work, so -- I don't know the extent of it,

11:24 1 but I know that his job did involve travel.

2 THE COURT: Right.

3 MS. BARBIER: But, Your Honor, that was also paid for
4 by Adidas.

5 THE COURT: Right.

6 MS. BARBIER: He doesn't have the funds to do that and
7 I think he has a fundamental right to be at these proceedings
8 if Your Honor leaves him in, and that just works an extreme
9 burden and hardship on his family, which has already undergone
10 a very --

11 THE COURT: Let's suppose you're right, suppose you
12 convinced me, do I have the authority to sever him out and
13 transfer his case out there or should I dismiss it without
14 prejudice and make the plaintiffs refile out there?

15 MS. BARBIER: I think you should dismiss it without
16 prejudice and if the plaintiff wants to pursue Mr. Gatto, he
17 could do so in his home state of Oregon.

18 THE COURT: All right.

19 MS. BARBIER: Thank you, Your Honor.

20 THE COURT: All right. Very good. Who wants to go
21 next?

22 MR. JOHNSON: Your Honor, this is Wilbur Johnson with
23 Young Clement Rivers. I am local counsel for the defendant,
24 Munish Sood. I'd like to introduce Mr. Rich Zack of
25 Philadelphia, who will make the argument on behalf of Mr. Sood.

11:25 1 He's been admitted pro hoc.

2 THE COURT: All right. Very good.

3 MR. ZACK: Thank you, Your Honor. Your Honor, again,
4 my name is Richard Zack and I represent Munish Sood. We
5 believe the complaint should be dismissed because it does not
6 properly allege a violation of the RICO statute as to Mr. Sood.
7 We incorporate the arguments made by the other defendants to
8 the extent they apply to Mr. Sood, and I'll address two issues
9 that apply to him specifically and I think uniquely to him.

10 Mr. Sood is a financial advisor, Your Honor. He owns
11 his own business and he has no affiliation whatsoever with
12 Adidas. He is not an employee. He is not a contractor. He
13 literally has no affiliation. In fact, the complaint alleges
14 only that he had a handful of contacts with a single Adidas
15 consultant. He's never met an Adidas employee. In fact, he
16 is -- Mr. Sood advised his own clients on how they should
17 invest their money. That was his job.

18 Which brings me to the issue that I think the
19 complaint raises with respect to Mr. Sood, in that it does not
20 and cannot plausibly allege that he pursued the same purpose as
21 the purpose described in the complaint, which was to increase
22 and preserve Adidas's market share. There's literally not a
23 single allegation that even suggests that Mr. Sood cared one
24 way or the other what happened with respect to Adidas.

25 There's a general allegation, I think it's at

11:27 1 paragraph 104, that's general and conclusory and that describes
2 the purpose of this enterprise and that it was to increase or
3 improve Adidas's market share, but when you look at the actual
4 conduct that the complaint describes with respect to Mr. Sood,
5 it's actually, it's the opposite that's described. There are
6 no factual allegations in the complaint regarding Mr. Sood's
7 conduct which suggests that he would even care one way or the
8 other what happened with Adidas.

9 What is described in the complaint is a purpose that's
10 contrary to that, and that's namely he wanted to get a single
11 athlete, Brian Bowen, to hire him as a financial advisor, and
12 that's what the complaint alleges and that's what he did.

13 THE COURT: Most all professional athletes have a --
14 they have an agent to help them sign a contract, but then they
15 have a financial advisor for the duration of their careers,
16 right?

17 MR. ZACK: Say that again, Your Honor?

18 THE COURT: Most professional athletes have an agent
19 that helps them sign a contract, and then after that they have
20 a financial advisor from then on to advise them on their
21 investments and so forth.

22 MR. ZACK: That's correct, Judge.

23 THE COURT: And your man was wanting to be the
24 financial advisor.

25 MR. ZACK: His role was to be the financial advisor,

11:28 1 that is correct --

2 THE COURT: All right.

3 MR. ZACK: -- distinct from Adidas's purpose.

4 And again, the allegations of the complaint describe a
5 single delivery of a payment by Mr. Sood to Bowen, not even
6 money supplied by Adidas, and it alleges that he did so not
7 because he was intending to establish or improve Adidas's
8 market share, but he did so because he wanted Bowen to hire him
9 and wanted Bowen to go to the University of Louisville. That's
10 at paragraph 170 of the complaint. And that is the sole
11 allegation, the sole specific factual allegation that relates
12 to Mr. Sood and his purpose and what he did in this case, and
13 that's directly contrary to the requirement that he share the
14 same purpose as Adidas. The complaint simply does not allege
15 that he did that. It alleges that he had a different purpose
16 and that was a purpose that was consistent with his own
17 interests, which was to sign an athlete as a client.

18 He would get no revenue from any bottom line that
19 Adidas had, improvement that Adidas had. The only revenue that
20 he would get would be completely separate from this enterprise,
21 and that would be payments that he would get or compensation
22 that he would get for advising Mr. Bowen about how he should
23 invest his money.

24 There's a second deficiency related to this, Judge,
25 that the complaint -- what's required to allege a violation of

11:30 1 RICO is a -- that a defendant participated in the management of
2 the affairs of the enterprise, and there are several relevant
3 cases on this, including the *Reves* case, the Supreme Court
4 case, as well as *Southwood* and *Norton*. And what those cases
5 talk about is that it is not appropriate to sue a defendant
6 simply because he engages in tasks or conduct that might assist
7 the enterprise. You must allege that a defendant participated
8 in the affairs of the enterprise and that allegation does not
9 exist in the complaint. Again, as I said, the only allegation
10 is that Mr. Sood delivered this one payment and that is not
11 sufficient.

12 And for those reasons, Your Honor, we think the
13 complaint should be dismissed. There's simply not enough
14 alleged about Mr. Sood to support a RICO allegation.

15 THE COURT: All right. Thank you, sir.

16 MR. ZACK: Your Honor, if I could just address one --

17 THE COURT: Go ahead.

18 MR. ZACK: -- additional issue. There's a suggestion
19 in the response -- in the plaintiff's response about that
20 somehow Mr. Sood is collaterally estopped from making any
21 arguments or denying any facts in connection with the case.
22 And just briefly, that collateral estoppel argument does not
23 apply at this stage of the case. Your Honor's role is simply
24 to determine whether the --

25 THE COURT: All I'm looking at today is the

11:32 1 sufficiency of the claims. But I am curious, and I truly
2 haven't decided which way to go on this, but if I were to deny
3 the motion, how much discovery would we need in this case? How
4 much has been conclusively established?

5 MR. ZACK: Your Honor, what -- to address that, what
6 Mr. Sood admitted in his guilty plea was that he delivered one
7 payment to Mr. Bowen and that he did that as part of a -- what
8 was alleged in the information in the New York case, in the
9 criminal case, was that he did so as part of a scheme to
10 defraud Louisville.

11 There was no allegation or claim that he engaged in
12 any scheme or any RICO scheme as described in this complaint to
13 do any harm to Mr. Bowen. In fact, the -- as was pointed out
14 earlier today, the scheme charged in New York involved --
15 Mr. Bowen's father was deeply involved in that, having
16 delivered a payment -- or having received payments for years
17 from individuals to influence his son's decision on where to
18 play basketball. He was immunized. As part of his agreement
19 with the government, he had to disgorge himself of certain
20 payments that he had taken over the years. So the scheme in
21 New York is inconsistent with what's alleged in the complaint
22 in this case.

23 And as far as discovery goes, Your Honor, you know, I
24 don't know how much discovery would need to be done in this
25 case. I imagine that the plaintiffs would want to take

11:34 1 significant discovery. I think the question before Your Honor,
2 as you said, is, is the complaint sufficient? And it's not
3 sufficient as to Mr. Sood. Thank you.

4 THE COURT: All right. Thank you, sir.

5 MR. MANNING: Your Honor, Cory Manning on behalf of
6 Christopher Rivers.

7 THE COURT: Mr. Manning.

8 MR. MANNING: Mr. Taft has asked if he could have 30
9 seconds of my time to correct the record.

10 THE COURT: Certainly.

11 MR. TAFT: And I'll try and do it in less. I had made
12 a reference during my argument to *Hawkins v. NCAA*. I might
13 have said that that was a RICO case. It is not. It addresses
14 a 1983 constitutional property right.

15 THE COURT: All right. Thank you.

16 MR. TAFT: But the holding is that there was no
17 property interest in the basketball experience, so I wanted to
18 correct the record.

19 THE COURT: All right. Very good. Thank you for
20 that.

21 Mr. Manning?

22 MR. MANNING: Yes, sir. Thank you. Mr. Rivers adopts
23 the arguments that have been presented by Adidas and the other
24 defendants as stated in our briefs, but he sits in a relatively
25 unique position in this matter. I mean, not only did the

11:35 1 Southern District of New York not charge sports bribery, money
2 laundering, or bring a RICO claim, they also didn't charge
3 Mr. Rivers. He also didn't appear as a witness in that matter.
4 So he sits in a position that's much -- that's quite unique
5 compared to some of the other defendants and I think this is
6 why the complaint barely mentions him in any of the
7 allegations.

8 So the 14 times that I was able to count in the 251
9 paragraphs, it seems to be slight at best. The only
10 nonsubs- -- or the only nonconclusory substantive allegations
11 in the 83 pages relate to two events that happened in 2015, one
12 of those being an email that was purportedly sent to Adidas
13 employees asking them to summarize their trips, their marketing
14 trips, and another one relates to the -- Mr. Rivers' alleged
15 approval of the bribe to Dennis Smith to attend NC State.
16 Again, these are two and a half years prior to Mr. Bowen's
17 decision to attend Louisville, which brings up the proximate
18 cause issues that I think have been adequately discussed
19 amongst everybody.

20 With respect to discovery that it would take with
21 respect to Mr. Rivers, I would imagine it would be fairly
22 extensive. He also resides in Oregon.

23 THE COURT: I was just curious. Obviously that can't
24 dictate what I do today. I was just curious if anything was
25 preclusive we decided in the criminal case.

11:36 1 MR. MANNING: We would say no. I mean, first of all,
2 the collateral estoppel argument as to Mr. Rivers is completely
3 inapplicable as not being a party.

4 THE COURT: All right.

5 MR. MANNING: We brought these points that I've made
6 in my brief up to plaintiffs and didn't really receive a
7 response in opposition to any of them, so I bring that to the
8 Court's attention. There's a 50-page omnibus brief that
9 mentions three sentences and two footnotes with respect to
10 Mr. Rivers, and what we're asking the Court for is to give
11 Mr. Rivers a fair shot in responding to the allegations in this
12 complaint. Right now we have to sort of guess as to what
13 allegations plaintiffs might claim apply to Mr. Rivers in order
14 to build the necessary two predicate acts that are required to
15 bring a RICO claim against him.

16 With respect to the money laundering and the sports
17 bribery predicate acts, I think those have adequately been
18 dealt with and in my view dispensed with.

19 With respect to the money fraud claims that implicate
20 Mr. Rivers, we posit that those are inadequately pleaded at
21 this stage and they don't plead with particularity the who,
22 what, where, and when that are necessary for wire fraud claims.
23 He hasn't stated -- the plaintiff hasn't stated with any
24 particularity what Mr. Rivers did that would constitute a claim
25 for wire fraud.

11:38 1 We have three paragraphs: Paragraph 206 in the
2 complaint, paragraph 126 in the complaint, and paragraph 177 in
3 the complaint, two of which are pleaded upon information and
4 belief, and one of which deals with the Dennis Smith -- the
5 alleged approval of the Dennis Smith bribe.

6 Now, to the extent those are even -- even constitute
7 an act of wire fraud, it's only one, and to the extent this
8 Court might find that those are wire -- those are adequate
9 predicate acts, there's still a lack of causation that comes
10 with those, and that's been adequately dealt with throughout
11 the day as well.

12 With respect to -- I don't want to reiterate the
13 issues with respect to proximate cause, but I do want to make
14 clear for the Court that the only two substantive allegations
15 against Mr. Rivers are this February 2015 email that was sent
16 to Adidas employees seeking to have them summarize their
17 marketing trips and then an early 2015 allegation that he
18 approved a bribe to Dennis Smith. I anticipate that plaintiffs
19 are going to say, well, look at this purported enterprise. He
20 was part of the enterprise. He was in the chain. That's not
21 adequate under -- to plead a RICO claim, you need to plead at
22 least two predicate acts and each of those predicate acts need
23 to be the proximate cause of plaintiff's injuries. That's not
24 been done here.

25 With respect to the estoppel argument, I've already

11:40 1 commented on it briefly, the Microsoft antitrust litigation
2 case from the Fourth Circuit in 2004 adequately dispenses of
3 collateral estoppel applying to Mr. Rivers.

4 Also, the issue with the conspiracy claim against
5 Mr. Rivers has also been dispensed with today, I believe, by
6 arguing that there's no underlying substantive claim, so it
7 would be very difficult to find a conspiracy claim against my
8 client if there was no substantive claim.

9 Recognizing the Court's preference for brevity and the
10 work that's been done by my colleagues thus far, Mr. Rivers
11 requests that the Court dismiss the complaint against him with
12 prejudice.

13 THE COURT: All right. Very good. Why don't we take
14 a ten-minute recess before we hear from the plaintiffs,
15 all right? We'll be in recess.

16 (Recess, 11:40 a.m. to 11:56 a.m.)

17 THE COURT: All right. Who is going to speak for the
18 plaintiff?

19 MR. McLEOD: Your Honor, may it please the Court,
20 Mullins McLeod. I'm going to respond to the arguments made by
21 counsel for Adidas; and Colin Ram in my office is going to
22 respond to the jurisdictional motion and the individual
23 specific motions, Your Honor.

24 THE COURT: All right.

25 MR. McLEOD: Let me first start by saying that -- and

11:56 1 I don't mean this in any way flippantly or with disrespect, but
2 in reading the memo it was hard to follow because so many of
3 the arguments were really empty-headed and ultimately amounted
4 to nothing more than a logical fallacy.

5 For example, standing. In their initial motion they
6 argued that the contract with the University of Louisville was,
7 they conceded, a ground for standing. They then attempted to
8 plead away that standing on a factual basis that the university
9 exercise discretion and, quote, withheld him from competition
10 and therefore the racketeering activity could not be a direct
11 cause of the injury to that property interest.

12 Well, in our brief, Your Honor, we of course cited the
13 NCAA bylaws which make clear that Brian was rendered ineligible
14 when the racketeering activity played its last card, which was
15 an extra benefit that was received by Brian's father. There
16 was no discretionary decision to be made. He was in fact
17 ineligible at that time. Your Honor, we've cited the bylaws,
18 and I think it's 16.01 and 16.02, if you read those two
19 together. I think, in addition, Your Honor, there's a general
20 regulation in Section 12 of the bylaws.

21 In addition, it will not be in dispute in front of
22 this jury whether or not most of the defendants knew exactly
23 what they were doing and exactly what the harm would be caused.
24 On page 26 of our memo, defendant Gassnola: "I knew these
25 payments would render the athletes ineligible."

11:59 1 As for defendant Sood: "...who, in truth and in fact,
2 were ineligible to compete as a result of the payments."

3 With regard to the University of Louisville, they
4 testified, their compliance director testified in New York:
5 "The amateurism would not be valid at that point if that
6 happens." That's the extra benefit. You see, the universities
7 are members of the governing institution, the universities
8 don't get to call balls and strikes. Once a student's
9 eligibility has been destroyed by the nefarious conduct of
10 others, all the university does is certify the ineligibility,
11 let the NCAA know that the student is now ineligible.

12 THE COURT: All right. But you say, when the
13 defendants point out in their memos that the university would
14 still have honored his scholarship, you say that's going beyond
15 the pleadings and getting into the facts?

16 MR. McLEOD: No, Your Honor. What I was saying was
17 they attempted to plead away with facts the fact that the
18 contract gives us standing under RICO and the fact in their
19 initial pleading --

20 THE COURT: What contract? The scholarship contract?

21 MR. McLEOD: Yes, sir. The scholarship is a contract,
22 and that is in Exhibit No. 5 to our brief, Your Honor, and if
23 you'll look at this particular contract, on the first page of
24 it, it indicates that he has a full ride for all four years,
25 okay? And to understand what that means is, the student

12:00 1 athlete has a very precious commodity.

2 THE COURT: Let me stop you. I thought the current
3 practice was to make them for one year at a time. Is that not
4 correct?

5 MR. McLEOD: Unless you're a blue chip five star
6 that --

7 THE COURT: Do blue chips --

8 MR. McLEOD: -- every coach in the country wants.

9 THE COURT: Do blue chips get a --

10 MR. McLEOD: That's right, you get a better deal --

11 THE COURT: Okay.

12 MR. McLEOD: -- because your amateurism, your
13 eligibility is of that much more value to the university. And
14 so the kids take great care to preserve their eligibility
15 because it is something that is required to play in the NBA
16 proving ground, Division I athletics. And so when you enter
17 into a contract with the University of Louisville like what's
18 marked as Exhibit 5 to our memo, what does Brian Bowen give the
19 university? He gives them his God-given ability and his
20 eligibility. He commits that eligibility to them.

21 And what does any university give in return? Yes, the
22 academic part, but in addition you get a Hall of Fame coach.
23 You get a \$237 million Yum Center to train in. You get the
24 best dieticians, the trainers, and you get elite competition
25 where you hone your skills in the NBA proving ground, and you

12:01 1 get exposure on national TV.

2 That's why, Your Honor, players like Zion Williamson
3 don't go to Elon. They take that eligibility and they go to
4 who gives them the most and the best.

5 And so in the first brief they say, well, it's -- we
6 didn't directly injure it because the University of Louisville
7 made a discretionary decision. We then give them the bylaws
8 and show them, no, that's not how this stuff works. So then in
9 the reply brief -- and I don't know if you picked up on this --
10 so then in the reply brief they say, well, if you look at the
11 bylaws that plaintiffs submitted to the Court, then it was
12 University of Louisville and the NCAA who didn't recertify him
13 or didn't get him reinstated and that was the proximate cause
14 of the loss of the tangible benefits and the contracted rights
15 he had with that contract.

16 And Your Honor, I mean, that argument, okay, aside
17 from the fact that it makes no logical sense, that is like a
18 guy runs a red light and hits a lady who is properly in the
19 crosswalk, and when he's sued in a wrongful death case he says,
20 I didn't directly cause her death because there were two
21 surgeons standing on the corner and they didn't do anything to
22 help her. I mean, that is what that argument is. I understand
23 intervening acts of negligence. There's an act of negligence
24 before the injury. There's another act of negligence which
25 excuses the first party's negligence.

12:03 1 Here, there is no dispute he was rendered ineligible
2 because of the racketeering activity and for no other reason.
3 And Your Honor --

4 THE COURT: Let me -- again, this may be oversim- --
5 but didn't Cam Newton's father get some money and he wasn't
6 declared ineligible?

7 MR. McLEOD: So what happened, Your Honor, was when
8 Cam Newton -- and Mr. Taft was right, Cam Newton didn't have to
9 sit out a year. I was at the SEC Championship game. He was
10 there.

11 THE COURT: Okay.

12 MR. McLEOD: And it was a brutal experience. But he
13 didn't, Your Honor. And so what happened was after Cam Newton,
14 that whole ordeal, the NCAA went back and they amended their
15 bylaws, it's referred to in general terms as the Cecil Newton
16 Rule, and now the bylaws make it -- render an athlete
17 ineligible if a parent or family member receives an extra
18 benefit.

19 THE COURT: That rule came in after Cam Newton.

20 MR. McLEOD: Yes, sir, it did, as a result of Cam
21 Newton, okay?

22 THE COURT: Pretty bad when you're the parent of a
23 player and you get a NCAA rule named after you.

24 MR. McLEOD: Well, it's not technically in the bylaws,
25 but everybody generally refers to it at such, Your Honor.

12:04

1 THE COURT: All right.

2 MR. MCLEOD: And going back to the contract again,
3 Your Honor, on the second page of the contract -- and again,
4 this is an Athletic Tender Agreement, so this idea that the
5 contract, this bundle of sticks that Brian owned, was just for
6 math class is just not accurate. It was an Athletic Tender
7 Agreement. And in fact, on page -- the second page of
8 Exhibit 5 the document specifically says that, "I understand
9 that this tender will not be reduced, canceled, or non-renewed
10 at any time." Meaning it's mine, four years, I'm your athlete,
11 I'm giving you my eligibility, or for any other athletic
12 reason.

13 The problem was, in order for Brian to perform what he
14 was required to do under contract, he had to be eligible to
15 play basketball, and so when -- when Gatto, Code, and Dawkins,
16 the already convicted defendants, were sentenced in New York,
17 the Court ordered restitution to Louisville. For what?
18 Because they -- not because they lost a math student, because
19 they lost their athlete.

20 And if you look, Your Honor, they cite the due process
21 cases, and I think it was either in their reply or their first
22 brief they say, you know, counsel for plaintiff doesn't even
23 comment on the due process cases, and I want to comment on it
24 because I think, Your Honor, this case has a real chance to
25 effect reform in college athletics. If you look at the --

12:06 1 well, if you look at the *Roth* decision and then you look at the
2 *Perry versus Sindermann* case, which is the U.S. Supreme Court
3 case that came after the *Roth* case, this is what the
4 U.S. Supreme Court said with regard to a property interest that
5 requires due process. And remember, Your Honor, RICO does not
6 say in order for us to have standing, we have to have an injury
7 to a constitutionally and protected business interest or a
8 constitutionally protected property interest. No. RICO says
9 in order to have standing to bring the suit, we have to have a
10 direct -- an injury to a business or a property interest.

11 But in the due process analysis, even if the statute
12 required us to have a constitutionally protected interest that
13 was injured, we would satisfy that statutory language based
14 upon the mandate set forth by the U.S. Supreme Court. And in
15 *Perry versus Sindermann* the Supreme Court said, "We have made
16 it clear in *Roth* that 'property' interests subject to
17 procedural due process protection are not limited by a few
18 rigid technical forms. Rather, 'property' denotes a broad
19 range of interests that are secured by 'existing rules or
20 understandings.' A person's interest in a benefit is a
21 'property' interest for due" processes -- for the "process
22 purposes if there are such rules or mutually explicit
23 understandings that support his claim of entitlement to the
24 benefit and that he may invoke at a hearing."

25 So this contract, this Exhibit No. 5, that is not a

12:08 1 hope or a wish, that's a four-year deal. Contracts have been a
2 protected interest --

3 THE COURT: The benefit of the contract is the
4 enjoyment of playing college basketball?

5 MR. MCLEOD: The benefit of the contract is the
6 development -- on the athletic side of it, it is the
7 development, it is the coaching, it is the sports science, it
8 is the exposure on national TV, it is the elite competition.
9 One of the things that is so important in a young basketball
10 player's development is they're all regional, so in most games,
11 like with Zion Williamson at Spartanburg Day, he might have one
12 good player on the other team when you play Spartanburg Day's
13 league schedule, okay? And so because of that, they don't
14 develop as quickly, unless you're Zion Williamson, as if you
15 had five players on the other team who were at an equal level.
16 And that is why all of these kids gravitate to the top tier
17 programs, because you have elite competition, elite training,
18 and elite coaching.

19 And once he was rendered ineligible, all of that was
20 lost. And this is an important part, Your Honor, and the
21 defendants have done it in their brief, and it's a mistake
22 that's made often, they have conflated the direct injury
23 requirement for standing and proximate cause for damages. And
24 those two are distinct legal concepts.

25 In the *Holmes* decision, Your Honor, that was a

12:09 1 standing case where the Supreme Court took the opportunity to
2 interpret the statutory language by reason of and said that
3 there had to be a direct injury for standing. Not for your
4 damages, for standing. The damage to that interest, property
5 interest or business interest. And so his eligibility, because
6 it was destroyed by their conduct, was an additional ground for
7 standing under RICO.

8 The next part, Your Honor -- and if Your Honor has any
9 questions on the standing, I'm happy to answer those. The idea
10 that Brian was not harmed or directly harmed by the
11 racketeering activity is --

12 THE COURT: Let me suggest this --

13 MR. McLEOD: Yes, sir.

14 THE COURT: -- if you don't mind.

15 MR. McLEOD: Yes, sir.

16 THE COURT: I'd be interested in getting Mr. Taft's
17 response to what you just said. Can you just stand down for
18 just a minute?

19 MR. McLEOD: Yes, sir.

20 THE COURT: Mr. Taft, most of your argument focused on
21 the prospective pro career and all that, which certainly could
22 be debatable. There are a lot of people who do well in college
23 who don't pan out on the professional level and vice versa.
24 But what about his argument that the conduct destroyed his
25 contractual rights to play basketball in a major school against

12:11 1 top-notch competition, play on television, get good training
2 and good nutrition, and he was rendered ineligible to do all
3 that because of the alleged conduct? What about that?

4 MR. TAFT: Your Honor, we'd refer you straight to the
5 contract. If plaintiff is now alleging that that contract
6 entitled him to be on the team, to play starting point guard,
7 to get training, to really do anything other than receive
8 tuition, books, board, then that's a contract that Louisville
9 can't give him. The rules are very clear about what
10 universities can offer and agree to provide to students. So if
11 their position is that, no, I had a contractual right to all of
12 those things, then that makes him ineligible by his own
13 conduct. You can't -- you don't see students going in talking
14 to coaches and saying, okay, so we agree if I come here that
15 I'm the starting point guard, and they say, yes, we agree,
16 that's a deal, you have a right to that.

17 He didn't have a right to that because that's
18 something the university couldn't give him. So without a
19 contractual right, what does he have? He has a mere
20 expectancy. He has a highly probable, very -- you know, very
21 probable likelihood that he's going to be on the team, that
22 he's going to play, that he's going to get the training, but he
23 does not have a contractual property interest and that's what
24 RICO requires. The reference to *Perry v. Sindermann*, the idea
25 that constitutional property for due process is a broad

12:12 1 concept, that's fine, but property -- business or property
2 under the RICO statute is a narrow concept, it's a demanding
3 showing.

4 And I'd refer Your Honor to *Gaines v. University of*
5 *Texas* where it was -- that one was a RICO case and the
6 plaintiff said, because of this RICO violations, I've been
7 denied the educational opportunities that I get under my
8 scholarship agreement. And the court said, no, that is too
9 speculative. That is intangible and that does not support RICO
10 standing.

11 THE COURT: All right. Thank you, sir.

12 MR. TAFT: Thank you.

13 THE COURT: Mr. McLeod?

14 MR. McLEOD: Yes, sir, Your Honor. And again, I don't
15 want to diverge too much on this, but --

16 THE COURT: We'll add about two or three minutes back
17 to your time because the clock kept running while we heard from
18 Mr. Taft.

19 MR. McLEOD: Yes, sir. Just real quickly, we aren't
20 required to have a constitutionally protected business or
21 property interest to have standing under RICO, but even if the
22 statute required it, we would have it, Your Honor, and that was
23 the point that I was making.

24 THE COURT: Well, I think Mr. Taft does have a point.
25 I'm sure no school -- no matter how blue the blue-chip person

12:13 1 is, they're not going to guarantee him playing time and star
2 status and all that, are they, in the contract?

3 MR. McLEOD: Your Honor, here's -- here's the issue.
4 The distinction between standing, I have a right to access the
5 statutory scheme and bring this private right of action, and my
6 damages, okay? Those are two totally distinct concepts. And
7 so when they injure my bundle of sticks that are protected
8 rights, I have standing to access that statutory scheme. And
9 a lot of what Mr. Taft is talking about obviously will be part
10 of the damages evidence, contesting evidence in this case. And
11 I'll tell Your Honor, I wish we could plead it all and try this
12 case real soon, but we can't. It's a burden I'm well aware of
13 and we look forward to meeting that burden in front of the
14 jury. No, there's no contractual right to be the starting
15 point guard and that's not what the right was injured. The
16 right was his eligibility and the contract that he had with
17 this university. That is the right. And under NCAA bylaws,
18 once he was rendered ineligible, not only could he not play any
19 basketball games, he was banned from the facility. He couldn't
20 even go to the dadgum training room because that would be
21 against NCAA bylaws.

22 THE COURT: And then when he came here to Columbia, he
23 never got eligibility down here either, right?

24 MR. McLEOD: That's correct, Your Honor.

25 THE COURT: And after a year in South Carolina, that's

12:15 1 when he went to the European league.

2 MR. McLEOD: Right, yes, sir. So the NCAA never made
3 a decision on his eligibility.

4 THE COURT: It was still pending when he --

5 MR. McLEOD: It was still pending.

6 THE COURT: -- left USC.

7 MR. McLEOD: You're right. All of that will go to the
8 damages argument at trial. Of course they'll say, well, there
9 are no damages, and of course we will say, no, you know, when
10 you're out of basketball for two years and you lose access to
11 the NBA proving ground, it's a real impact on your career. And
12 we will have very qualified experts who will be able to explain
13 to this Court and to the jury the severe impact on a person
14 like Brian Bowen having his eligibility destroyed.

15 THE COURT: Just out of curiosity, the contract he did
16 sign a couple of weeks ago when he didn't get drafted, is it
17 like Minor League baseball where the salary is just almost
18 minimum wage practically compared to what professionals make?

19 MR. McLEOD: So, and not to get too far down the road,
20 Your Honor, but the NBA is different than other sports and,
21 really, the guaranteed money in the NBA is your first round
22 pick. Your second round picks, some of them get really good
23 guaranteed money. The, in essence, free agents like what Brian
24 signed with Indiana is nothing like a first-round or
25 second-round pick, both in terms of compensation and in terms

12:16 1 of whether you actually make it to the NBA. And so it's very
2 different.

3 And what I think I hope the Court appreciates is, you
4 know, the two most important decisions a professional
5 basketball player makes in his career are both made while he is
6 an amateur. One, we're not going to spend the year after I
7 graduate from high school because I cannot go through the NBA
8 draft because of the collective bargaining agreement. The
9 evidence will show once we get down the road that 99 percent of
10 all these kids go to the NBA proving ground, which is
11 Division I men's basketball.

12 The second decision that is critical to your career is
13 when do I forego my eligibility? When do I forego it and enter
14 the draft? Because you can only enter the draft one time. And
15 so when to trade your eligibility is very important.

16 Now, it's interesting in this case the defendants say,
17 well, you know, it was very speculative and he would have --
18 might not have -- he might not have even started. Judge, when
19 they didn't think anybody was listening, they said on the
20 wiretaps, he is an NBA lock. If he plays at Louisville for one
21 year, he's a second-round pick, if he plays for two years, he's
22 a first-round pick, and that's why we gotta go get him. He's
23 going to Oregon, which is a Nike school. We have got to get
24 him away from Oregon because if we don't get him away from
25 Oregon, he's never going to sign with Adidas once he turns pro.

12:18

1 THE COURT: That's all on tapes.

2 MR. MCLEOD: Absolutely, Your Honor, and they're
3 attached as exhibits to our brief. And Your Honor, because he
4 began with the Southern District of New York, I want to mention
5 that too. This is the prosecutor's opening statement to the
6 jury: But the defendants knew that the only way to make their
7 scheme work, the only way for the defendants to get any return
8 on their investment, was to keep the payments secret, because
9 in the world of college basketball these payments were
10 prohibited. Colleges could not and would not issue athletic
11 scholarships to players whose families had accepted money. And
12 if the players didn't get these scholarships and if they
13 couldn't play college basketball and if they were able to wear
14 the Adidas brand and in games on national television, the
15 defendants couldn't make any money off of them.

16 So to make their scheme work, to make a profit, the
17 defendants did not simply have to make payments to the families
18 of student athletes, they needed to conceal these payments --
19 they needed to conceal these payments, they had to lie about
20 them in fake invoices, they had to hide from using secret
21 phones and cash handoffs in hotel rooms and parking lots, all
22 to make sure that the universities did not know, so that the
23 schools would issue athletic scholarships even though those
24 players were no longer eligible to compete.

25 And finally: And the defendants did this knowing that

12:19 1 if payments were ever discovered, the players and the schools
2 would be in big trouble -- the players and the schools would be
3 in big trouble and subject to very significant potential harms,
4 including financial penalties.

5 And so this idea that three of the defendants have
6 already been convicted, two of them didn't want to take their
7 chance in front of a jury and they pled guilty to the wire
8 fraud, has nothing to do with this case is a logical fallacy,
9 and this is why. The Supreme Court, in the *Phoenix versus --*
10 *Phoenix Bond* case, Your Honor, and that was a wire fraud
11 case -- I'm sorry, that was a mail fraud case, but as the Court
12 knows, under 1341 and 1343, the operative language, any
13 artifice or scheme to defraud is the same language.

14 With regard to mail fraud, this is what the
15 U.S. Supreme Court said: The mail fraud statute... defines a
16 fraudulent scheme, rather than a particular false statement, as
17 the crime. It is illegal to obtain money by a scheme that
18 entails fraud if the use of the mail is integral to the scheme.
19 That's why it is unnecessary to show that the false statement
20 was made to the victim.

21 And then the Supreme Court went and made it crystal
22 clear: A scheme that injured D, University of Louisville, by
23 making a false statement through the mail to E is mail fraud
24 and actionable by D through RICO.

25 So a scheme that injured us that was directed to

12:21 1 someone else is still actionable by us. Stated differently,
2 there is no first party reliance for mail or wire fraud, but in
3 this case, Your Honor, we will be able to prove they actually
4 defrauded us and deceived us, because in order for the bribery
5 scheme to work, they have to have somebody who has access to
6 the family. They have to. They have to have somebody who the
7 family trusts. In this case it's Christian Dawkins.

8 So if you look at Brian's official visit to the
9 University of Louisville, Christian Dawkins goes and he's
10 listed as his former AAU coach. Brian thought Christian
11 Dawkins was there to give him basketball advice. What he
12 didn't know was that when Merl Code and Jim Gatto found out
13 that Brian was going to Oregon, they got Dawkins on the phone
14 and said, heck no, we gotta get this kid. Those conversations,
15 Your Honor, are in our brief. Brian didn't know that.

16 And so this idea that Brian somehow is equally at
17 fault as Adidas and the other participants for me is hard to
18 follow for two reasons.

19 They first argue apparent authority. Before I get
20 there, factually it makes no sense to me. Judge Kaplan said,
21 in New York, that Brian was clearly the person most victimized
22 by the bribery scheme. The court also made reference, as did
23 the government, on multiple occasions during the trial and in
24 the sentencing memo that Brian had no knowledge of the bribery
25 scheme. And so they want to take apparent authority, and the

12:24 1 way I understand apparent authority is a principal can be
2 bound, liable to an injured party through contract or tort if
3 there is apparent authority. Well, Adidas isn't the injured
4 party and they're not holding Brian liable through contract or
5 tort.

6 THE COURT: I agree with --

7 MR. McLEOD: It doesn't make --

8 THE COURT: I agree with you on that. I don't --

9 MR. McLEOD: It doesn't make any sense.

10 THE COURT: You don't need to spend any more time on
11 *pari materia*.

12 MR. McLEOD: Okay. Okay. And so anyway, Your Honor,
13 and I do want to go over, as far as the common purpose and a
14 couple of things because I think it's important to point out
15 for the record.

16 First, in the *Boyle* case, the U.S. Supreme Court
17 rejected the argument that the enterprise had to have a name,
18 had to have a hierachal structure, had to have a formal
19 organization. The U.S. Supreme Court rejected that argument
20 and in doing so they pointed out the plain language of the RICO
21 statute. And I quote from the *Boyle* decision: In light of
22 RICO's broad statement that an enterprise includes any group of
23 individuals associated in fact, although not a legal entity,
24 and a requirement that RICO be liberally construed to
25 effectuate its remedial purposes, Turkette explained that

12:25 1 enterprise reaches a group of persons associated together for a
2 common purpose of engaging in a course of conduct and is proved
3 by evidence of an ongoing organization, formal or informal, and
4 by evidence that the various associates functioned as a unit.

5 In this case, Your Honor, the scheme actually had a
6 name. It was Black Ops. Mr. Rivers is wondering why he's
7 here. Because he's on the email. And the email refers to the
8 bribery scheme as Black Ops and it says, guys, don't mention
9 Black Ops, don't put it in writing. The coordination among the
10 members is all through our brief and it is also, with regards
11 to Dawkins, Gatto, and Code, already proven, Your Honor. And
12 we've cited those transcripts in our brief.

13 To make no mistake, with regard to the fact that the
14 bribery scheme specifically targeted Brian, if you'll look at
15 Exhibit 3 to our motion, this is the colloquy between Code and
16 Dawkins:

17 They are blue bloods -- so first of all, they're Blue
18 Blood programs.

19 He's talking about Kansas.

20 They've got a lot of resources, and they've got a lot
21 of existing relationships with agents, agencies, runners, and
22 Nike.

23 So if I let my kid go to Kentucky, I promise you I
24 won't get him back. Brian Bowen was going to Oregon and I was
25 like he is not going to Oregon.

12:27 1 They specifically targeted Brian. Your Honor, with
2 regard to this idea that the mother ship had no idea what was
3 going on and I guess somehow the -- you know, Brian was
4 emancipated, so somehow the sins of the father belong to the
5 child, but the sins of a 20-year executive don't belong to the
6 for-profit. And the problem Adidas has in this case, Your
7 Honor, among other things, is that whether Adidas knew is
8 already a factual issue in this record in this case. Both
9 Gatto and Code, in prior filings with this Court, have said
10 that everything they did was at the direction of and/or in the
11 course and scope of employment with Adidas. There is nothing
12 Adidas can do to unring that bell or to change those facts that
13 have been pled into this record at this stage.

14 When Gassnola, who was an additional defendant, Your
15 Honor, testified in New York, and this is Exhibit 4 of our
16 memo, he testified under oath subject to penalties of perjury
17 that it has been a long-standing practice at Adidas to violate
18 NCAA rules. That's page 16 of Gassnola's transcript, Exhibit
19 No. 4 to our memo, Your Honor.

20 And when asked in the New York trial, well, were you a
21 rogue guy? Were you out there acting on your own?

22 No. He acted in concert with Merl Code, Christian
23 Dawkins, and Jim Gatto, that 20-year executive at Adidas who,
24 not coincidentally, they hired away from their competitor Nike
25 along with Sonny Vaccaro.

12:29 1 So in addition to the coordination among the
2 defendants and the participants in this bribery scheme, it was
3 repeated often. Gassnola testified that he was involved with
4 the participants in this case in bribing five other families.
5 That's on page 915 of Gassnola's testimony, which is Exhibit 4
6 to our motion.

7 And so I think ultimately what this trial -- and I'm
8 not going to get into the estoppel issues, I want to argue the
9 merits --

10 THE COURT: You've got about 13 minutes left. I still
11 want to have some argument about the sports betting component
12 and the money laundering component.

13 MR. McLEOD: Yes, sir. On the sports betting,
14 Mr. Ram --

15 THE COURT: Yes, well, I know, but --

16 MR. McLEOD: -- is going to address that --

17 THE COURT: All right.

18 MR. McLEOD: -- if that is okay. But with the Court's
19 nudge, I'll move to the money laundering.

20 So the money laundering piece, first, in a civil case
21 I recognize that we are at a disadvantage as opposed to a
22 criminal case, because we can't put a CPA up at this stage and
23 show the finances. In a criminal case they execute a warrant,
24 they get the books, and they can follow the money. The only
25 way we can get access and prove the case is with access to the

12:31 1 books. But what we know already satisfies the statutory
2 language in the cases interpreting the language with regard to
3 money laundering. In particular -- and the money laundering
4 statute I think is 1956 -- it is money laundering if you engage
5 in activity that is designed to disguise the ownership of the
6 funds. It is also money laundering, under the plain reading of
7 the statute, if you conduct an activity that is designed to
8 avoid a reporting requirement, either state or federal.

9 So let's see how the Adidas bribery scheme worked?
10 And this is where I say really and truly greed is the mother of
11 injustice. So Adidas sends the bribe to their AAU programs, a
12 nonprofit. In this case, it was the Karolina Khaos.
13 Mr. Gatto's lawyer asked about South Carolina connections.
14 Well, the dadgum bribe ran through South Carolina. The AAU
15 coach then cashes the check and literally delivers -- I don't
16 know if they take it in a Kroger sack, I don't know how you
17 carry around that kind of cash. For Dennis Smith at North
18 Carolina State I think it was over \$40,000. And Gassnola
19 testified in New York that in that instance he took the money
20 out of his Adidas AAU account, paid the cash money, and Adidas
21 reimbursed him. Other than the fact that on its face, you
22 don't have to go to law school to know something ain't right
23 there.

24 So when Adidas sends the money, the AAU club produces
25 a sham invoice, and then in this case the AAU club sent a check

12:33 1 to Mr. Dawkins' and Mr. Sood's business, who they then turned
2 it into cash to deliver it.

3 Now, think about this. RICO was passed, if we really
4 zoom out on all this stuff, to eliminate the underground
5 economy, organized crime. You cannot use our telephones, our
6 mail, and our legitimate legal means to run your underground
7 world. That's why they passed the dadgum statute. And the
8 enforcement scheme was so specific that they gave injured
9 parties like Brian a private right of action. And I have read
10 many federal statutes in my over 20 years trying to find
11 language to say that it creates a private cause of action.
12 This one, it is stamped right on the front of it. And so when
13 they deliver the cash, they know that the most they can give
14 any person, which is the family member, is \$14,000 a year or
15 else you have to file a gift tax return. That is dodging a
16 reporting requirement.

17 THE COURT: I thought the limit was \$13,000.

18 MR. McLEOD: Or 13. I thought it was 14. I know it
19 changes --

20 THE COURT: I might be wrong.

21 MR. McLEOD: Yes, sir. But there's no excuse. The
22 money that was delivered -- the participants delivered to
23 Brian's father was in excess of the gift limit per the IRS.

24 In addition, the fake invoice that the AAU club
25 generates, these AAU clubs are aligned with Adidas. That is

the grassroots. Nike has their AAU clubs, Under Armour has theirs, and Adidas has theirs. Well, benevolent corporations have reporting requirements too. It's called a Form 990. Well, they can't report on a Form 990, we bribed the kid's dad to get him to go to our flagship school, so they create the fraudulent invoice so that they don't raise any red flags on their Form 990.

And I concede, Your Honor, at this point we do not know whether the slush fund that Nike kept was recycled, meaning that the dirty money stayed dirty, or it was integrated in with the good money, and that is what discovery will demonstrate, Your Honor. Our requirement at this stage is simply to plead it, and there's more than enough information to plead it.

In addition, Your Honor, Gassnola testified in the criminal case that it was Adidas's money that was used to bribe the five families, including Brian Bowen.

Lastly, Your Honor, on the jurisdictional piece for defendant Gatto, Mr. Ram is going to address that, but if the Court is at all concerned about whether there is some inconvenience for Mr. Gatto, I would ask the Court to allow jurisdictional discovery and let us determine in fact --

THE COURT: I can make a *prima facie* determination and allow discovery to go forward on it.

MR. MCLEOD: That's correct, Your Honor.

12:37 1 THE COURT: But let me ask you this. If there was
2 ever a case where it would be burdensome to litigate in South
3 Carolina, wouldn't it be with a defendant from Oregon? Isn't
4 that about as far away as you could ever -- in other words, if
5 there's no undue burden here, when would there ever be an undue
6 burden anywhere in the Continental United States?

7 MR. McLEOD: Well, one thing that would make it an
8 undue burden is if Adidas is picking up the tab and we don't
9 know that. Now, we do know that Gatto has told this Court that
10 he doesn't have a job and he is of limited means. He told the
11 federal court in New York to please let him travel extensively
12 across the country. He says it was for vacation plans. We
13 have evidence it was to support his new business which was a
14 marketing company, and you got to travel all over the country
15 to meet these kids where the kids are.

16 THE COURT: All right. Well, I find a *prima facie*
17 showing has been made. I'm going to deny the motion to dismiss
18 on jurisdictional grounds for Mr. Gatto and you don't need to
19 argue that anymore.

20 MR. McLEOD: Okay, Your Honor.

21 THE COURT: It will come back up again after
22 discovery.

23 MR. McLEOD: Yes, sir. If there are any other
24 questions the Court has, certainly if I have missed something,
25 rely on the briefs --

12:38 1 THE COURT: All right.

2 MR. MCLEOD: -- and I'm happy to answer any questions

3 the Court may have.

4 THE COURT: All right. I think you've covered it.

5 MR. MCLEOD: Thank you, Your Honor.

6 THE COURT: Are we going to talk about the sports

7 betting now?

8 MR. RAM: Yes, Your Honor. And I'd like to talk about

9 sports betting and the conspiracy and then some of the

10 individual actions. We can start with the sports betting since

11 it has your attention right now, Your Honor, and the sports

12 betting statute, 18 U.S.C. 224, is very broad in scope, and the

13 Fourth Circuit has recognized that, that it is to be

14 interpreted broadly because it's written broadly, and that was

15 Congress's intent when they drafted it.

16 Now, admittedly there's very few reported cases

17 brought under the sports bribery statute, but that should not

18 be read to be indicative of its reach. Now, you know, one of

19 the more famous cases was the Boston College point-shaving

20 case, and if you've seen the movie *Goodfellas*, that was Robert

21 De Niro's character who was bribing college athletes to shave

22 points on games, and they were prosecuted under The Sports

23 Bribery Act. And more recently it's been used in cases on

24 horse tracks with jockeys who are pulling back on their horses.

25 But the elements are very straightforward. The

1 elements are broad and the elements are met here in this case.
2 And it's simply, the statute says "whoever carries into effect
3 or attempts to carry into an effect." And that language that
4 you can be guilty of the substantive act of sports bribery just
5 by attempting sports bribery, that's the breadth of it, and the
6 Fourth Circuit has made that notation in its case law.

7 Or if you conspire with any other person to carry into
8 effect a scheme in commerce to influence, in any way, by
9 bribery any sporting contest.

10 And that's exactly what we have here. You have
11 Adidas, you have Jim Gatto, you've got the individual
12 defendants who are engaged in bribery. They didn't deny that
13 in the criminal trial. There's no question that money was
14 paid, that that money came from Adidas. That's not an issue.
15 And that was to bribe, to influence.

16 And so I think possibly the Court's concern is that,
17 well, how does this influence the outcome of a sporting event?
18 And this really goes to the heart of what college basketball is
19 today in this country. In our complaint we talked about, this
20 is a \$20 billion -- this is valued \$20 billion just to the
21 NCAA. That's their budget. The NCAA as an institution doesn't
22 generate money off of college football. They make their money
23 off three weeks in March, March Madness. They sell the TV
24 rights to CBS and Turner, and in exchange for that they
25 got \$20 billion. That funds the NCAA.

12:40 1 THE COURT: I did not know that. It dwarfs college
2 football revenues?

3 MR. RAM: Absolutely. College football, financially
4 it's a completely different scheme. It's run by the
5 conferences. College basketball is run by the NCAA. And so
6 the NCAA needs college basketball. And there's a little bit of
7 a tension there, and I hope possibly the Court would recognize
8 the tension in this case and what's going on in the bigger
9 picture of this case and the fallout from this case, because
10 quite possibly, the NCAA might be a little reluctant to dig too
11 deep into what's going on, into what these athletic companies,
12 what Adidas has been doing to these families.

13 And we know from Mr. Gatto's opening statement in his
14 criminal trial his attorney said that they're going -- we're
15 just trying to help these families, put a little extra --
16 something extra in their pocket to tide them over. They're
17 targeting poor families. They talked about, and it drew an
18 objection in the opening, they talked about how one of the
19 students, their families, lived in public housing, and that
20 what they're doing is benevolence. And that is the furthest
21 thing from the truth. This is not benevolence.

22 And defendant Gatto's attorney talked about the
23 purpose of RICO and we talked about how it's designed to
24 address a special harm to society, and I can't picture a
25 greater special harm in the world of athletics than taking

12:42 1 advantage of young kids.

2 THE COURT: All right. Now, you're getting off the
3 topic about sports betting, though, aren't you?

4 MR. RAM: Right, well, it's sports betting to
5 influence in any way, Your Honor, and that's exactly what this
6 scheme was, to influence the outcome of these games.

7 THE COURT: I don't follow you. You haven't won me
8 over yet. Tell me how it would affect the outcome of the game.

9 MR. RAM: It affects the outcome of the games because
10 the reason the scheme exists, the reason the bribery exists is
11 because they need winning teams. They need winning players on
12 winning teams. Defendant Code's attorney in the criminal trial
13 talked about this in the opening, and this is in our papers,
14 that they need to win, and so -- and this is the motive, this
15 is why they're influencing through bribery.

16 And Adidas, in the case that we cited, they sued the
17 NCAA. They sued the NCAA because their logo -- their logo was
18 three and a half inches and the NCAA was restricting how big
19 the three-stripe logo can be on the uniforms. And Adidas said
20 in that litigation in the District of Kansas, and we've put
21 excerpts into our opposition brief, that this is so critical to
22 their business that the logo needed to be seen, and the reason
23 the logo needs to be seen is because they need to bribe, they
24 need to influence these games by stacking the deck, by putting
25 the top McDonald's All Americans, by putting the five-star

12:43 1 players on Adidas teams because they've made this \$160 million
2 investment in the University of Louisville and they need to
3 recoup their money. That's an investment.

4 And so they engage in this bribery. And what they do,
5 by influencing, is by taking players like Brian Bowen, who is
6 going to go to Oregon, who is going to play for a Nike school
7 and saying, no, no, no, we're going to get him over here.
8 Through hook and crook, we're going to bring him over to
9 Louisville through bribery, and through that bribery we're
10 going to influence, we're going to make Louisville a better
11 team. We're going to influence the outcome of the
12 basketball --

13 THE COURT: The bettors, the people placing bets on
14 Louisville, know that they're full of blue-chip players --

15 MR. RAM: Right.

16 THE COURT: -- when they make their bet, so I mean,
17 the odds factor that in, don't they? I mean, I still don't
18 follow you, I don't think.

19 MR. RAM: Right, but it's not a sports betting
20 statute, it's a sports bribery statute, and so, you know, the
21 cases we've talked about, the point shaving, the reason there's
22 point shaving is because there's bettors. When we talk about,
23 we look at some of the case law regarding horse tracks, of
24 course there's bettors at horse tracks, but this is not a
25 betting statute, this is a sports bribery to influence, and so

12:44 1 nobody was betting, saying, okay, we don't know who the lineup
2 is going to be, we don't know what players are playing for
3 Louisville, but Adidas was stacking the deck with top players,
4 with five-star players, because they wanted to influence this.
5 And they wanted to influence it because of the money, because
6 this is a \$20 billion.

7 And when we were preparing the complaint, that number
8 shocked me. \$20 billion just for the TV rights to three weeks.
9 This is an enormous industry that exists and the amount of
10 money that they funnel to put their logos on these kids just so
11 these kids appear on TV, that is the influence. It has nothing
12 to do with betting, but it has everything to do with bribing to
13 influence these games.

14 THE COURT: All right. You've pretty much used up
15 your time.

16 MR. RAM: Thank you, Your Honor. And I want to talk
17 briefly, if I may, about the conspiracy.

18 THE COURT: All right.

19 MR. RAM: We've addressed this in our papers, and the
20 conspiracy is essentially, the standard under RICO is that the
21 defendant knew about the racketeering activity and agreed to
22 facilitate it. There doesn't need to be a handshake agreement.
23 There doesn't need to be a meeting sitting around the table and
24 making a verbal agreement. If you're aware of the racketeering
25 activity and then you participate in it, you are conspiring

12:46 1 under the RICO statute. And each of these defendants has done
2 that. Adidas did that. They funded the enterprise. They
3 maintained what the government described as a million-dollar
4 slush fund for paying bribes to families. Mr. Gatto, who was
5 the mastermind, of course, he was the one, the ringleader, he
6 was the one signing off on these payments. Mr. Code, he
7 facilitated the sham invoicing scheme. Mr. Sood, he owned the
8 business.

9 And with the Court's indulgence, I would like to take
10 a minute to talk about Mr. Sood and Mr. Rivers.

11 THE COURT: Really, I got to be fair. The other side
12 respected the time limits that were announced. I'm reluctant
13 to let you go too much further. I promise you, I've read the
14 briefs. I'm aware of your argument.

15 MR. RAM: Okay. Well, real quick, Your Honor, because
16 I want to make sure that we understand the role of Mr. Sood and
17 Mr. Rivers in this. Mr. Sood is not some financial manager who
18 was just brought in at the back end to help manage the money of
19 these kids. He was the bag man. He took the Kroger sack of
20 money and delivered it to the family, to the father, in a
21 parking lot. He's been on plenty of wiretaps, plenty of
22 undercover video with the FBI. He formed a business called
23 Loyd, L-O-Y-D, with defendant Dawkins and with the undercover
24 FBI agent. The idea that under the Reves line of cases, that
25 he is just some outside advisor without any knowledge and

12:47 1 therefore he's excused from RICO liability just does not fit
2 the facts as we've pled them in the case.

3 And in terms of Mr. Rivers, we've pled multiple places
4 in the case, and the primary instance we've talked about this,
5 paragraphs 110 and 111 of the complaint, Black Ops, that was
6 Chris Rivers, that was his directive, don't put this in
7 writing, and Mr. Gassnola testified at the criminal trial that
8 what Mr. Rivers was talking about was bribes to family and he
9 didn't want any evidence of it. And in our complaint we talk
10 about Mr. Rivers' role. He was in charge of these AAU teams,
11 these grassroots basketball teams. And in that capacity, he
12 had the decision-making. And we allege this in the complaint,
13 that in terms of the money and the money laundering and wiring
14 and paying out these sham invoices, he was part and parcel of
15 that.

16 And so in terms of plausibility, we didn't name the
17 accountant that testified in New York, the Adidas accountant
18 who said that she had no idea that these were bribes. Of
19 course she had no idea. Why would she know? She even
20 testified that it's not her responsibility to know what these
21 payments are for, just to make sure that the form's completed
22 correctly and it processes through the computer system.

23 But somebody like Chris Rivers is entirely different
24 because of this email, because he's part and parcel of it, and
25 the government mentioned there was a lot of discussion of Chris

12:49 1 Rivers at the criminal trial. Now, whether or not the
2 government prosecuted him or not, whether he has immunity,
3 that's an entirely different thing, and that's one of the
4 frustrating things that we've heard here today, Your Honor, is
5 that on the one hand our case is a cynical attempt to recover
6 and to piggyback off the criminal case, but when we broaden our
7 case and we include money laundering, which actually Mr. Gatto
8 was charged with, and if you look at Exhibit 2 to our complaint
9 on page 4, you're going to see a money laundering conspiracy
10 charge brought against Mr. Gatto, but all of a sudden we bring
11 a civil RICO case and it's, well, the government didn't do
12 that. So if the government didn't do that, well, you know, why
13 should we do that? And of course there's plenty of case law,
14 there's Supreme Court case law that says you don't need to have
15 a criminal case to bring a civil RICO case. And so that line
16 of argument I think should carry no weight with the Court.

17 THE COURT: All right. I think you've covered it.

18 Thank you, sir.

19 MR. RAM: Thank you, Your Honor.

20 THE COURT: All right. We didn't spell out any reply
21 time, but I'll hear briefly from each defendant if you want to
22 say something very briefly.

23 MR. TAFT: Thank you, Your Honor.

24 THE COURT: All right. Mr. Taft.

25 MR. TAFT: Your Honor, I don't think the plaintiffs

12:50 1 really made any attempt to argue that the future profits that
2 Mr. Bowen may or may not earn as a professional athlete are in
3 fact the type of tangible --

4 THE COURT: They didn't really address the
5 professional aspect at all, it's all college eligibility.

6 MR. TAFT: They didn't. And I would posit that under
7 the RICO statute, under 1964(c), you need to show standing
8 before you can seek damages. You can't say, oh, I've got
9 standing for my out-of-pocket costs and that's enough to claim
10 treble damages for all of these other types of injuries that
11 were not to my business or property and that are not directly
12 caused by the defendants' conduct. The statute simply doesn't
13 work that way. So if Your Honor feels that they've proved
14 injury or caused this to certain parts of the damages they
15 claim, I'd ask that Your Honor specify that just so we know
16 what we're dealing with.

17 THE COURT: And limit the discovery going forward?

18 MR. TAFT: Well, that does tie to the discovery,
19 right, because if it's a question of what are his out-of-pocket
20 costs, I imagine with respect to damages, at least, the
21 discovery might be limited.

22 If it's a question of getting in experts who are going
23 to try and figure out, well, he was like this and then, you
24 know, that, but the hamstring, who knows, and the point is --

25 THE COURT: Mr. McLeod, how about that? You're not

12:51 1 waiving your claim for damages for loss of professional
2 basketball opportunities.

3 MR. McLEOD: No, Your Honor, and I'll address if -- I
4 know Your Honor has probably heard enough.

5 THE COURT: I've got a full afternoon of criminal
6 guilty pleas starting pretty quickly here.

7 MR. McLEOD: Right. So there -- well, I don't want to
8 interrupt him, but when he's done --

9 THE COURT: All right. Go ahead --

10 MR. McLEOD: -- I'll be happy to --

11 THE COURT: -- Mr. Taft.

12 MR. McLEOD: -- address the Court.

13 MR. TAFT: Okay. The point is, that's all tangible,
14 it's all speculative, it's all in the future, and that is not
15 recoverable under RICO and it's not a question of, well, I've
16 got standing and damages are later. No, you have to -- it's a
17 pleading problem, it's not a proof problem, it's not a
18 quantification problem.

19 We addressed the contract issue earlier. Again, if a
20 coach leaves, if they lose their TV deal so they're not getting
21 the same level of profile or expectation as they were when they
22 agreed to commit, that's not a breach of contract. That's not
23 anything that they're entitled to under contract. It's not a
24 tangible right. So it's not something they can claim for here.

25 I'll turn just very briefly to the bribery issues and

12:52 1 really all of the predicate acts. Adidas wasn't charged.
2 We've made that clear. We've heard them pulling things out of
3 the transcript here and there, but to suggest that really
4 anything is off the table with respect to Adidas's defense of
5 this action is not supported by the law of preclusion nor would
6 it really be fair for Adidas to be bound by either admissions
7 or findings of a trial that it had no part in.

8 And just one last point. Counsel referred to, again,
9 what he calls a multimillion-dollar slush fund for bribes to
10 families and he says that that's what the government called it.
11 The government didn't call it that. We've pointed this out in
12 the brief. The government said that Mr. Gatto controlled a
13 multimillion-dollar budget. It didn't say that that budget
14 existed for this purpose and that's precisely the point. They
15 have no facts that show that either the directors or officers
16 or the corporate policy or anything that Adidas did as Adidas
17 was in furtherance of or in support of the alleged scheme and
18 therefore Adidas should be dismissed. Thank you very much,
19 Your Honor.

20 THE COURT: All right. Thank you, sir. Any other --
21 Ms. Barbier?

22 MS. BARBIER: Yes, very briefly.

23 THE COURT: Ms. Barbier, I didn't mean to cut off your
24 reply argument on jurisdiction, but I just think that at this
25 stage, at the pleading stage, I can find a prima facie case has

12:54 1 been made out and --

2 MS. BARBIER: I understand, Your Honor. And --

3 THE COURT: -- we'll address it --

4 MS. BARBIER: -- I appreciate you --

5 THE COURT: -- substantively later.

6 MS. BARBIER: -- letting me know so I don't waste any
7 more time on that argument.

8 THE COURT: Okay.

9 MS. BARBIER: Your Honor, just briefly in response to
10 a few things that were addressed in the previous argument. You
11 know, I think it goes without saying that these universities
12 around the country spend a lot of money hiring very smart
13 lawyers to draft these contracts with student athletes and the
14 scholarships that they are receiving, and of course they draft
15 them specifically so that the athletes do not have a property
16 right or a property interest in their hope or their dream or
17 their expectation of all of the things that we've talked about
18 today: The right to any specific position on the team, the
19 right to have a specific trainer, or specific exposure.

20 They can't do that, Your Honor, because what if you're
21 Penn State and your program gets suspended for four years?
22 Does every athlete on that team have a -- has their property
23 interest been taken from them? No, of course not. It's in
24 their contracts that they don't have such an interest.
25 Universities specifically give them only the academic

12:55 1 scholarship and they have the right or they have the -- they
2 have the ability to play on the team if they continue to remain
3 eligible.

4 So the property interest, Your Honor, I think is --
5 it's well established in that area of the law. The athletes
6 just don't have that right. They have a hope, they have a
7 dream, they have, you know, a wish and an expectation that they
8 get to do all these things and it turns out great and they all
9 end up in the first round of the NBA draft, but as we know,
10 that only happens to a very, very, very few people. So that's
11 what I would say about the property interest issue.

12 Going back to the money laundering issue, because I
13 think the plaintiff's attorneys made an argument that they're
14 at a disadvantage here because they can't put a CPA at this
15 point to identify what ill-gotten gains there are. Well, Your
16 Honor, the government had the ability to do that. They had
17 access to all of those records and they didn't do that. They
18 didn't charge money laundering. They charged it in the
19 complaint which, as you know, is a document that's drafted
20 normally quickly and by an agent in the first 30 days to arrest
21 somebody when you want to end a wiretap or there's an exigent
22 circumstance normally. They dropped that money laundering
23 charge against Mr. Gatto and the other defendants and
24 decided -- made a decision not to bring it, presumably with
25 good reason.

12:56 1 So I would argue, Your Honor, that when you look at
2 the complaint and you look at how they have alleged the money
3 laundering activity, they simply say that -- they simply refer
4 to 18 U.S.C. 1956 and 1957. Well, as Your Honor knows, that
5 1956 and 1957 have very specific provisions within them that
6 each have distinct elements that have to be alleged and proven
7 in order to sustain a conviction or to find someone liable
8 under it. They have not identified for you which of those
9 provisions they're relying upon, but if you look at the
10 elements of 1956 and 1957, under any of them, under (a)(1)(A),
11 under (a)(1)(C), under any of those, Your Honor will know from
12 the jury instructions you give in money laundering cases they
13 have not alleged that. They cannot allege that because all of
14 it requires the person to have knowledge and to have the ill --
15 have -- it has to be derived from unlawful activity, and it
16 just simply doesn't exist here, Your Honor.

17 THE COURT: All right.

18 MS. BARBIER: Thank you.

19 THE COURT: Thank you, Ms. Barbier. Anyone else?

20 MR. MANNING: Mr. Rivers, I'd like to speak on behalf

21 of Mr. Rivers.

22 THE COURT: All right.

23 MR. MANNING: I can do it quickly and I'll do it from

24 here.

25 THE COURT: Go ahead.

12:58 1 MR. MANNING: The pleading problems with respect to my
2 client persist. I said in my argument that you would hear:
3 Mr. Rivers was part of the enterprise, just look at the
4 enterprise, just look at the email from two and a half years
5 before Mr. Bowen entered Louisville, just look at that.

6 Well, we're looking, and we looked, and there's still
7 not two predicate acts that are traced to Mr. Rivers and those
8 two predicate acts independently have no causation. So I think
9 the pleading problems that I identified in our briefs and that
10 we identified in our argument persist.

11 I have nothing further.

12 THE COURT: All right. Excuse me one second.

13 (Off-the-record discussion between the Court and the law
14 clerk.)

15 THE COURT: All right. At the present time -- I'm
16 going to take it under advisement and get you a written order,
17 but at the present time it seems to me that I should grant the
18 motion to dismiss for failure to state a claim as to the
19 allegation of sports bribery as a predicate act to
20 racketeering. I'm probably going to grant the motion with
21 regard to that with prejudice and without leave to replead.

22 And I'm probably going to grant the motion to the --
23 as to the allegation of wire fraud as a predicate act of
24 racketeering for failure to comply with the heightened pleading
25 standard required of fraud, but that will be with leave to

01:00 1 amend.

2 And then I'm probably going to deny the motion in all
3 other respects and let the case go forward.

4 So I guess you ought to know as you leave here, I'm
5 probably going to do an order that's going to allow some of
6 this case to go forward, and if the plaintiff wants to replead
7 the money laundering, you can. And is 15 days enough?

8 MR. McLEOD: That is, Your Honor, and we'll just make
9 a decision on whether, you know, we're going to do that. We
10 appreciate the Court's courtesies in that regard.

11 THE COURT: All right. This is all tentative now. I
12 reserve the right to change my mind if I get back there and
13 talk to my lawyer and he convinces me to do something
14 different. But while you're all here, let me just ask,
15 assuming the case goes forward, how long do we need for
16 discovery?

17 MR. McLEOD: Depends on how long they fight us. I
18 mean, I would think, Your Honor, that, you know, six to eight
19 months' worth of discovery and we can be ready for trial within
20 a year, just based on what we know now. Now, obviously that
21 could change. There's no way for me to completely, you know,
22 understand the landscape, but that's what I would think at this
23 point.

24 I'm not a believer in taking discovery for the sake of
25 taking discovery. I'm not going to go depose a hundred people

01:01 1 at Adidas. I try my cases a specific way and it's not going to
2 change in this case, Your Honor, so we'll be as efficient as we
3 can possibly be.

4 THE COURT: So you say six to eight months for
5 discovery?

6 MR. MCLEOD: Yes, Your Honor.

7 THE COURT: All right. Mr. Taft, yes, sir.

8 MR. TAFT: Your Honor, I'll have to obviously confer
9 with my client but, you know, we know the facts and have our
10 arms around what happened here. We should be able to manage
11 that. I would ask, with respect to our discovery of Bowen, as
12 I mentioned during the argument, it's going to matter what sort
13 of damages they're pursuing here.

14 THE COURT: Right.

15 MR. TAFT: If that could be addressed in Your Honor's
16 order, we would appreciate it.

17 THE COURT: Well, can I parcel out the damages on a
18 motion to dismiss for failure to state a claim? I guess I can.

19 MR. TAFT: Well, it's not -- because it's not -- as we
20 say, it's not a damages question, it's a standing question.

21 THE COURT: Standing question, right.

22 MR. TAFT: They don't have standing.

23 THE COURT: Don't have standing to allege loss of
24 professional income.

25 MR. TAFT: Correct, or we would argue the benefits of,

01:02 1 you know, having a college professional experience. We think
2 that the --

3 THE COURT: All right. Let me think about that. Let
4 me think about that.

5 MR. TAFT: Thank you, Your Honor.

6 THE COURT: All right. I'm going to take a short
7 break and then I got to move into my criminal matters for the
8 rest of the day. Anybody else have any procedural -- does
9 either side anticipate hiring an expert witness?

10 MR. McLEOD: Your Honor, that was going to be the only
11 thing that might extend discovery, because obviously we
12 recognize that they may not retain experts until they hear what
13 our experts have to say, and that's perfectly their right to do
14 so, and we are at a disadvantage because we can't have our
15 experts prepared until we've gotten a full course of discovery.

16 And so as long as the discovery process goes smoothly
17 and I'm able to get the information to our experts, I think
18 eight months should suffice. And I guess if Your Honor is
19 thinking about doing a preliminary scheduling order, I would
20 ask that you please push the expert designations as far
21 downstream as possible, which helps both parties.

22 THE COURT: Normally I require the plaintiffs to
23 designate about halfway through the discovery period and then
24 the defendant to designate 30 days after that. You say I
25 should push that back toward the end of the discovery period?

01:04 1 MR. McLEOD: Yes, sir. So push our deadline closer to
2 say three-quarters into discovery and then I don't care when
3 they name their experts. I mean, they could name them -- it
4 doesn't matter to me.

5 THE COURT: You want it named in time --

6 MR. McLEOD: I may not even depose them before
7 (cross-talk, indistinguishable).

8 THE COURT: You want it named in time to take a
9 deposition.

10 MR. McLEOD: Right, right. So to me I'm not
11 concerned, as long as they're named in advance of us being able
12 to take their deposition, if I take their deposition. I might
13 just do it here instead.

14 THE COURT: Well, the experts would relate to damages
15 or what?

16 MR. McLEOD: Well, there are going to be experts on
17 compliance. There will be damages experts. Your Honor, while
18 we're there, you know, their argument is that lost profits does
19 not equal standing and, Your Honor, that is not true. The two
20 cases they cited was the *Strates* amusement park case and the *In*
21 *Re: Honda* case.

22 In the *In Re: Honda* case, what happened was Honda
23 dealers had contracts and they got a specific allotment of
24 cars, but then some Honda dealers went and bribed the
25 mother ship to get extra cars, and so -- and this is what the

01:05 1 court said in *In Re: Honda*. I therefore conclude --

2 THE COURT: Wait.

3 MR. McLEOD: Yes, sir.

4 THE COURT: I don't need any more argument. I just
5 want to find out about --

6 MR. McLEOD: Okay.

7 THE COURT: -- the scheduling order.

8 MR. McLEOD: Yeah, well, I just wanted -- you said you
9 were still thinking about that one, so I didn't want to risk
10 the opportunity to give a little more, so...

11 THE COURT: Well, you worry me a little bit when you
12 said you were going to have an expert on compliance. I usually
13 bristle up when a party calls an expert witness to tell the
14 jury what the law is or what the regulations require because
15 that's supposed to be my job.

16 MR. McLEOD: Well, when I say "compliance," it would
17 be specific to the NCAA bylaws if they contest the fact that
18 upon receipt of the extra benefit, the eligibility is
19 destroyed.

20 THE COURT: All right. Well, let me --

21 MR. McLEOD: If they contest that, we would have to
22 respond.

23 THE COURT: Let me go ahead and make up my mind on
24 this motion today and then we might have a status conference to
25 talk about a scheduling order and discovery either

01:06 1 telephonically or getting everybody back together again. We
2 got a lot of out-of-state lawyers, don't we?

3 MR. McLEOD: Yes, sir.

4 THE COURT: That's why I wanted to bring it up today.

5 MR. McLEOD: Yes, sir.

6 THE COURT: Ms. Barbier, did you want to say
7 something?

8 MS. BARBIER: Yeah, Your Honor, I just wanted to put
9 the Court on notice that one of the things that I'm considering
10 doing is bringing in -- adding some third-party defendants, and
11 I'm still considering that.

12 THE COURT: All right.

13 MS. BARBIER: But I wanted to put the Court on notice
14 because I know that may --

15 THE COURT: Right, that will certainly impact.

16 MS. BARBIER: -- affect your scheduling.

17 THE COURT: That certainly will, yes.

18 MS. BARBIER: Yeah.

19 THE COURT: Right. Well, as you know, the scheduling
20 order always has a deadline for amending the pleadings and
21 joining new parties and that's early in the -- you know, one of
22 the first deadlines we come to really.

23 MS. BARBIER: Correct. Thank you, Your Honor.

24 THE COURT: So how long -- what's a reasonable time to
25 put -- to decide that?

01:06 1 MS. BARBIER: I would say 30 days, Your Honor --

2 THE COURT: I was thinking --

3 MS. BARBIER: -- from the date of your order.

4 THE COURT: Yeah, 30 days from the date of my order,
5 that would be fine.

6 MS. BARBIER: Okay.

7 THE COURT: That would be fine. All right.

8 MR. TAFT: Your Honor, I think a scheduling conference
9 after we've seen your order would make sense.

10 THE COURT: Yeah, I think we'd better. There's too
11 many moving parts here. I think we better get back together.

12 MR. TAFT: Thank you.

13 MR. MANNING: Your Honor, with respect to your order
14 in this case, you talked about getting rid of the sports
15 bribery predicate act and the wire fraud predicate act with
16 leave to amend on that one.

17 THE COURT: Right.

18 MR. MANNING: Will it be clear in your order kind of
19 what's left and what they have to --

20 THE COURT: I will. I'll be much more clear than I am
21 right now.

22 MR. MANNING: I'm not suggesting that you're not being
23 clear --

24 THE COURT: Okay, all right.

25 MR. MANNING: -- but I'm probably just

01:07 1 misunderstanding it.

2 THE COURT: Okay. Very good. Nice to see all of you.
3 Thank you very much. We'll be in recess.

4 (Proceedings concluded at 1:07 p.m.)

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1 UNITED STATES OF AMERICA)
2 DISTRICT OF SOUTH CAROLINA) ss:
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4)
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4 C E R T I F I C A T E
5

6 I, Carly L. Horenkamp, Certified Shorthand
7 Reporter in and for the United States District Court for the
8 District of South Carolina, do hereby certify that I was
9 present at and reported in machine shorthand the proceedings
10 had the 26th day of June, 2019, in the above-mentioned court;
11 and that the foregoing transcript is a true, correct, and
12 complete transcript of my stenographic notes.

13 I further certify that this transcript contains
14 pages 1 - 97.

15 IN WITNESS WHEREOF, I have hereunto set my hand at
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/s/ Carly Horenkamp

Carly L. Horenkamp, RDR, CRR, CRC
Certified Shorthand Reporter

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